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CONTAINING

CASES DECIDED

IN THE

Several Courts of Lehigh County

AND IN OTHER COURTS.

REPORTED BY

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Members of the Lehigh County Bar.

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TABLE OF CASES REPORTED

Page

Aitken, Son & Company v. Leaf et al. 113
Alcania Company v. Avonmore Land and Imp. Co. et al. 331
Alexander's Estate 370
Allentown Electric Light & Power Co., Dottery v., 17
Allentown Electric Light & Power Co., Mills v., 137
Alsace Township, Stein v., 88
American Silk Co. v. Monarch Silk Co. 28
Arbogast & Bastian, Brander, v., 408
Arnold, Aurand, v., 392
Auch v. Auch 27
Aurand v. Arnold 392
Avonmore Land and Imp. Co., et al. Alcania Company v., 331
Bachman, Pilgert, v., 194
Backenstoe v. Hunsicker 403
Barton Mfg. Co., Kemmerer, v., 182
Beach et al., Evans et al., v., 349
Bethune's Administrators v. Boquet Distilling Co. 202
Bowen et al., Whipple, v. 25
Bowie, Meredith, v. 256
Bowman, Hain, v. 325
Boquet Distilling Co., Bethune's Administrators, v. 202
Braucher v. Somerset, Borough of 293
Brander v. Arbogast & Bastian Co. 408
Bright, Felin Co., v. 240
Buckley, et al., Litzenberg et al., v. 65
Byrne v. Miller et al. 354
Central R. R. Co., of N. J. v. Mauser & Cressman, 127
Clear Springs Water Co., McNabb v. 163
Clear Springs Water Co., Township of Whitehall, v. 171
Cohen, Rolland, v. 144

Page

Commissioners of Lehigh County, Com. Ex rel., Gehman, v. 183
Commissioners of Lehigh County, Com. Ex rel., Koch, v. 174
Commonwealth v. Frasso 220
Commonwealth, Ex rel., Gehman v. Commissioners 183
Commonwealth v. Kehoe 267
Commonwealth Ex rel., Koch v. Commissioners 174
Commonwealth Ex rel., v. Krapf 409
Commonwealth v. Kurtz 191
Commonwealth v. Ramsey 413
Commonwealth v. Ward 396
Conestoga Traction Co., Cover, v. 224
County of Lehigh, Jones v. 56
Cover v. Conestoga Traction Co. 224
Delaare & Hudson Co., Short & Co., v. 58
Directors of Home for Destitute, Momeyer, v. 33
Dottery v. Allentown Electric Light & Power Co. 17
Estate of Alexander, Edgar W. 370
Estate of German, Daniel S. 49
Estae of Gordon, William C. 214
Estate of Metzgar, Lovina 52
Estate of Puza, Michael 362
Estate of Royer, Adam 76
Estae of Styer, Mary J. 211
Estate of Warren, Henry S. 123
Etter v. St. Paul Fire & Marine Ins. Co. 69
Evans et al. v. Beach et al. 349
Felin Co. v. Bright 240
Fink v. Mike 306
Foltz, Lehigh Valley Cornice Works, v. 201
Frasso, Commonwealth, v. 220
Frick v. Lehigh Valley Transit Co. 142

Page
Geise, Mayer, v. 248
George, Weiler, v. 177
German, Daniel S., Estate of, 49
Glase, Hale & Boles v. The Harvey R. High Co. 101
Goeser v. Voris 383
Goodman, Fannie, Trading as The Empire Dry Goods Co., Silvia Bros., v. 315
Gordon, William C., Estate of 214
Gottschall v. Kapp et al. 53
Graff Furnace Co., v. Scranton Coal Co. 378
Hain v. Bowman 325
Haines et al., v. Roberts et al. 192
Hamilton, Lee, v. 44
Handy v. Kistler 199
Hatton v. Scranton, School District of, et al. 156
High, Harvey R., Co., Glase, Hall & Boles, v. 101
High, Harvey R. Co., Topken Co., v. 105
Highspire, Borough of, v. Jones 97
Hunsicker, Backenstoe, v. 403
Indexing of Deeds and Mortgages in Recorder's Office, In re 107
Jones v. Lehigh, County of 56
Jones, Highspire, Borough of, v. 97
Jones v. Wolfe 196
Kapp et al., Gottshall v., 63
Kehoe, Commonwealth, v. 267
Kemmerer v. Barton Mfg. Co. 182
Killen v. Peer et al. 40
Kistler, Handy, v. 199
Koch, Com. Ex rel., v. Commissioners of Lehigh County 174
Komarony v. Winger 55
Krapf, Commonwealth, Ex rel., v. 409
Kurtz, Commonwealth, v. 191
Lauer, Yost, v. 110
Leaf, et al., Aitken, Son & Company 113
Lee v. Hamilton 44
Lehigh, County of, Stewart Contracting Co., v. 190

Page
Lehigh Valley Cornice Works v. Foltz 201
Lehigh Valley National Bank, Skeer, Adm. et al., v. 217
Lehigh Valley Transit Co., Frick v. 142
Litzenberg, et al., v. George Buckley, et al. 65
Liquor Licenses 179
Loucks' Assigned Estate 302
Macungie Borough, Stein et al., v.
Mauser & Cressman, Central R. R. Co. of N. J., v. 127
Max et al. v. Miller 200
Mayer v. Geise 248
Meredith et al. v. Bowie et al. 256
Mertz, Christian & Co. v. Reading, City of 317
Metropolitan Electric Co., Reeser, v. 242
Metzgar, Lovina A., Estate of, 52
Mike, Fink, v. 306
Miller et al., Byrne, v. 354
Miller, Max et al. v. 200
Mills v. Allentown Electric Light & Power Co. 137
M'Nabb v. Clear Springs Water Co. 163
Mogel v. Reeser 258
Momeyer v. Directors of Home for Destitute 33
Monarch Silk Co., American Silk Co., v. 28
Morrison v. Page Woven Wire Fence Co. 117
M'Rell v. M'Rell 152
Muller & Bro. v. Rittersville Hotel Co. 166
Myers, Sellers, v. 311
New Schiller Building and Loan Assn v. Schautz and Lange 286
Page Woven Wire Fence Co., Morrison, v. 117
Peer et al., Killen, v. 40
Pennsylvania Construction Co., Sellick v. 95
Pilgert v. Bachman 194
Puza's Estate 362
Raphael and Zeugschmidt v. Saltzer et al. 231
Ramsey, Commonwealth, v. 413

Page
Reading, City of, Mertz, Christian & Co., v. 317
Reeser v. Metropolitan Electric Co. 242
Reeser, Mogel, v. 258
Reilly & Raub v. Widmyer and Kinard 276
Rittersville Hotel Co., Muller & Bros., v. 166
Roberts, Haines et al., v. 192
Rogers v. Wright 183
Rolland v. Cohen 144
Roughton, Snyder, v. 322
Royer, Adam R., Estate of 76
Saltzer v. Raphael and Zengschmidt 231
Schautz and Lange, New Schiller B. & L. Ass'n., v. 286
Schlager et al., Scranton, City of, v. 252
School District, of Scranton, City of, v. 252
School District, of Scranton, Hatton, v. 156
Scranton, City of, v. Schlager et al. 252
Scranton Coal Co., Graff Furnace Co., v. 378
Seagreaves, Strawridge & Clothier, v. 197
Seek, Adm. et al., Scranton, City of, v. 217
Sellers v. Myers 311
Sellick v. Pennsylvania Constructing Co. 95
Shenandoah Water Commission, Petition for 398
Short & Co. v. Delaware & Hudson Co. 58
Silvin Bros. v. Fannie Goodman, Trading as Empire Dry Goods Co. 315

Page
Skeer, Adm. et al. v. Lehigh Valley Nat. Bank 217
Snyder v. Roughton 323
Snyder, Wiand, v. 329
Somerset, Borough of, Braucher, v. 293
St. Paul Fire and Marine Insurance Company, Etter, v. 69
Steiger v. Steiger 270
Stein v. Alsace Township 88
Stein et al. v. Borough of Macungie 82
Stewart Contracting Co. v. County of Lehigh 190
Strawbridge & Clothier v. Seagreaves 197
Styer, Mary J., Estate of, 211
Tandlich v. Tandlich 26
Topken Co., v. The Harvey R. High Co., 105
Voris, Goeser, v. 383
Ward, Commonwealth, v. 396
Warren, Henry S., Estate of 123
Water Commission, Shenandoah, 398
Weiler v. George 177
Whipple v. Bowen et al. 25
Whitehall, Township of, v. Clear Springs Water Co. 171
Wiand v. Snyder 329
Widmyer & Kinard, Reilly & Raub, v. 276
Winger, Komarony, v. 55
Wolfe, Jones, v. 196
Wooten's Estate 1
Wright, Rogers, v. 183
Yost v. Lauer 110
Young et al. v. Zion Reformed Congregation 406
Zion Reformed Congregation, Young et al., v. 406

LEHIGH COUNTY LAW JOURNAL

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WOOTTEN'S ESTATE.

Executors—Compensation.

The office of executor is not one of profit, but of mere compensation for responsibility and trouble.

An executor's compensation for responsibility is determinate, and is fixed at two and one-half per centum of the amount of the estate administered.

In addition to compensation for responsibility, an executor is entitled to further compensation for trouble necessarily imposed upon him by the nature and condition of the estate and the character, variety and multiplicity of duties necessary performed by him, in the course of his administration.

There is no legal presumption that an executor is entitled to an allowance of five per centum of the total assets of an estate administered by him, but that he is, in all cases, entitled to two and a half per centum for responsibility, and, in addition, to such compensation for trouble, as will fairly compensate him for his work and time, done and given to the administration.

When the amount of the estate administered is $125,000 made up of mortgages, bonds, stocks and other personal property to be converted and distributed among fifty legatees, the mere simple administration of the estate entitles the executor to one and one-half per centum for trouble in addition to the determined commission of two and one-half per centum for responsibility.

Decedents' Estates—Payment of Special Legacies—Residuary Estate.

In the absence of expressed intention in the will, the law will apply a testator's estate first to the primary objects of his bounty, the special legatees; and until they are fully satisfied, there can be no residuary estate.

Same—Action of Exceptant Increasing Fund for Distribution—Compensation.

Where an exceptant by his activity wins for the estate a fund that inures to the benefit of all the legatees, he is entitled to a reasonable counsel fee to be borne equally by all who share the benefit.

In the Orphans' Court of Berks County. The second account of Cyrus G. Derr, executor of Sara Dunn Woot-

ten, deceased, called for audit September 5, 1911, and adjourned from time to time, to December 22, 1911, when the audit was closed.

Randolph Stauffer for Edwards S. Dunn, Legatee and Exceptant.
Cyrus G. Derr for the Accountant.
Frank S. Livingood for the Residuary Legatee.

Opinion by Bland, P. J., January 10, 1912.—The decedent died, testate, unmarried, and without issue, June 21, 1909. On July 23, 1909, an inventory of the estate was filed, amounting to $114,560.34. The executor filed his first account June 25, 1910.

By her will, to which she added three codicils, the decedent gave fifty pecuniary legacies, amounting to $129,800.00, and made specific bequests of chattels, appraised at $1,839.18. Upon the adjudication of the first account, the balance for distribution to pecuniary legatees was found to be $81,112.44, and a pro rata distribution was made upon the legacies of 62.49 per cent. Credit was taken in the first account for certain unadministered assets; and upon these the executor filed this, his second and final account, July 24, 1911. To this account, Edwards S. Dunn, a legatee, filed exceptions, complaining of the credits taken in the two accounts for the accountant's compensation, and that he had not charged himself with all the interest he ought to have received. The exception as to the interest, which it was alleged the accountant ought to have received, was abandoned at the audit, but the exception to the accountant's compensation is pressed. On the 9th of September, 1911, the exceptions came before the Court, for hearing; the accountant and exceptant both testified at length; and the cause was adjourned for further hearing. On the 16th of September, 1911, the executor filed in the office of this court the following writing:

"And now, September 16, 1911, without acting in any wise in consequence of any exceptions filed to my account, but voluntarily and for the benefit of all the distributees alike proportionately, I waive my right to compensation beyond 5 per cent. upon personality, and 3 per cent. upon realty, thus relinquishing my claim for

legal services and performing the said legal services gratuitously."

The question before the court, accordingly is, what will be due and lawful compensation to the accountant for his settlement of this estate, in his legal character, as executor of the decedent's will.

FINDINGS OF FACT.

From the evidence in the cause, I find the following facts:

1. That the assets included in the first account of the executor, and converted and administered by him, amounted to $96,435.06; and that the assets included in his second account, converted and administered by him, amounted to $28,788.50; and that the total amount of assets converted and administered by him, in both accounts, amounted to $125,223.56.

2. That as appears by the distribution upon the first account, there are fifty legatees entitled as beneficiaries under the will of the decedent; that the legatees are distributed in nine different States and in many different localities; that when it became apparent from the inventory filed, that the assets of the estate were insufficient to pay the legacies in full, the executor informed the legatees fully of the condition of the estate, and kept them advised of the progress of its administration; that this resulted in a large amount of correspondence between the executor and the legatees; that more than eight hundred letters, written and received by the executor, have been offered in evidence, to show the attention and work, given and done, by the executor in the course of the settlement of the estate, for the information and benefit of the legatees.

3. That the large number of beneficiaries under the will; the inadequacy of the assets to pay the legacies in full; and the desire of the executor to keep the legatees informed of the condition, and progress of the settlement of the estate, resulted in the written correspondence referred to in the second finding of fact.

4. That the accountant, being a member of the Bar, employed no legal counsel to advise upon legal questions arising in the settlement of the estate. Several legal questions arose in the course of the administration; one

relative to his duties in the distribution under the will, of Blue Plates, etc.; and the other concerning the abatement of legacies of different character, in consequence of the deficiency of assets to pay all legacies in full. That careful and exhaustive briefs were prepared upon these questions, by the accountant, and have been offered and admitted in evidence; and I find that a fair compensation for the preparation of the briefs would be $200.00.

An executor is the personal representative of the testator; and when he accepts the trust, he does so upon the assurance of the law that he will be compensated in accordance with its standards, in proportion to the complexity and difficulty of the estate; the labor necessarily involved in the execution of his trust, and the skill with which he performs it. The law demands of him, that he be careful and diligent; and if he is so, it promises him a fair and just remuneration for his services. It is manifest, from common experience, that there can be no Procrustean rule as to allowance for trouble; and the notion of such a thing is intrinsically absurd, because its operation would be palpably unjust. In this estate, the inventory covers thirteen pages of closely typewritten matter, including twenty-seven items of personal securities, consisting of mortgages, bonds, stocks, etc., many of which are groups containing a number of securities; and as above stated, the pecuniary legatees alone number fifty, apart from the beneficiaries given specific bequests of chattels. It goes without saying, that the mere simple administration of an estate, so conditioned, involves the maximum of care and labor, possible to simple administration of an estate of its type. There may be nothing to do, but to convert and distribute the assets; but in doing so, with so multifarious a subject, the product of which is distributable among so many persons, each having a different right, necessarily involves a large amount of detail work.

In 1838, the Supreme Court, in Stevenson's Estate, 4 Wharton's Rep. 103, expressly recognized two grounds of compensation to executors: first, responsibility for the receipt and disbursement of the money of the estate; and, second, for the trouble imposed upon the executor in the settlement of the estate. The Court there fixed the compensation for responsibility at a definite percentage, say-

ing, in that connection: "The responsibility which is incurred by the receipt and disbursement of money is a legitimate ground of compensation, and an unvarying rate per cent., without regard to the magnitude of the sum, will always be a just measure of it, because the responsibility increases in proportion to the amount. It is consequently susceptible of a uniform measure, which, we think, may be reasonably put at two and one-half per cent. Not so, the compensation of trouble. The settlement of a very large estate may be the business of a few days, while that of a very small one may occupy as many years; and the compensation for all beyond responsibility ought to be graduated to the circumstances."

The estate in judgment there amounted to $356,075.-93; and the executor was allowed 2½ per cent. for responsibility, and ½ per cent. for his trouble in the settlement of the estate. The rule there established, for compensation for responsibility, has been followed since; and was applied so lately as 1902 by Judge Penrose, in Sunderland's Estate (No. 1) 203 Pa. 156. Upon that established standard, the accountant here is entitled to an allowance of $3,130.59 for responsibility.

The exceptant contends that the allowance to be made to the executor here for his trouble should not exceed one-half per cent., and in support of his contention, refers to the fact that there was no litigation in the collection of the assets, and that they were converted into money by simple and ordinary sales, without more trouble than is usual in the settlement of estates generally. He maintains that the legal duties of the executor here were simple, and required nothing more of him than conversion and an account, at the end of a year, for distribution. He asserts that the voluminous correspondence which the executor had with the beneficiaries was mainly unnecessary, for the reason that the executor owed the beneficiaries no legal duties, but to convert the assets, and bring them into court for distribution. In short, it is claimed by the exceptant, that as the legal duty of the executor was conversion and accounting, his voluminous correspondence, and the trouble incident to it, was not necessary to the legal settlement of the estate, and is, therefore, no ground for an allowance of compensation for trouble.

A great many cases have been cited to the Court by the exceptant and the accountant; and it must be confessed that in none of them does this feature of administration appear as a substantive ground for compensation. The cases cited by the exceptant begin with that of Pusey & Clemson, 9 S. & R. 209, decided in 1822. The amount of the estate was $100,000, and 3 per cent. was allowed to cover both responsibility and trouble. In that case, Mr. Chief Justice Gibson said: "And in the cases which generally occur, it appears to me, after considerable research, that the common opinion and understanding in this country has fixed 5 per cent. as a reasonable allowance. But to this rule there must be exceptions. There are estates where the total amount is small, and that, too, collected in driblets. In such, 5 per cent. would be insufficient. On the contrary, there are others where the total being very large, and made up of sums collected and paid away in large masses, 5 per cent. would be too much." Adopting the standard subsequently established in Stevenson's Estate, supra, for responsibility, the Court, in Pusey *vs.* Clemson, allowed ½ per cent. for trouble.

Whelen's Estate, 70 Pa. 410, is next cited by the exceptant. The estate there amounted to $163,000, and a total allowance of 3 per cent. was made to the executors, as compensation for responsibility and trouble. That case, as appears at the foot of p. 431, was very unlike this one. It consisted of interest-bearing securities which were not converted into money, but were distributed in kind to four children, in equal parts, a little over two months after the decedent's death. The trouble there could not have been less, in an estate of that simple character; and here the trouble could not have been more, in one of its character; so that the percentage allowed there does not apply here.

In Lloyd's Estate, 82 Pa. 143, the case next cited, the whole estate amounted to $67,036.18, and is was held, in reversing the case, that a charge of 5 per cent. in that case was excessive. It appears from the opinion of Mr. Justice Woodward, at p. 149, that there had been some conduct on the part of the accountant of which the Supreme Court did not approve, and it cannot be accepted as a strict authority for this case.

The next case cited is Stewart's Appeal, 110 Pa. 410. The estate there amounted to $127,387.07. The accountant claimed $4,500.00 compensation, and the court below reduced it to $4,000.00. Mr. Justice Green, of the Supreme Court, said: "The accountant's compensation was fixed at $4,000.00 by the auditor and the court below. The debtor side of the account, as determined by the final decree of the court below, amounts to $127,387.07, and the credit side to $74,821.16. The estate was a very complicated one; the settlement of it extended through a number of years, and it is not yet closed; the account itself is of extraordinary length, containing a vast number of items. Very great responsibility was cast upon the accountant, and the compensation allowed is but a little over three per cent. We do not think this at all excessive; and the sixth assignment is therefore not sustained."

The exceptant next cites Barhite's Appeal, 126 Pa. 404, an estate of $80,000, and there were but three heirs. The executor was allowed 5 per cent., of which allowance Mr. Chief Justice Paxson said: "Under all the circumstances, this was liberal." The grasping spirit of the executor, in that case, is shown by his charging commission on $5,000 of advancements, and on his personal debt to the decedent, of $4,337.27; and its natural effect upon the court, would have been, and doubtless was, to prompt the Chief Justice to remark, that the allowance of 5 per cent. made by the court below "was liberal."

The next case cited by the exceptant is Semple's Estate, 189 Pa. 385 (1899). There the widow of the decedent was his executor. The settlement of the estate covered the period of eight years, and involved much litigation and incessant trouble to the executrix during the entire period. At the death of the decedent, his estate was insolvent. By careful nursing of the estate, the executrix paid the debts of the decedent, amounting to $247,644.11. Her pecuniary transactions during the settlement, amounting to $2,006,758.51, and her actual disbursements, to $357,916.46, upon which latter sum she charged a commission of 5 per cent., or $17,895.82. Inasmuch as she had, by the most adroit and diligent management, during a period of eight years, retrieved the whole estate from the insolvent condition in which the

decedent had left it, her commission of 5 per cent. was allowed. The case was a remarkable one, and shows, inter alia, that the male sex does not have a monopoly of ability and courage. At p. 400 of the report, Mr. Justice Green, of the Supreme Court, said: "Finally, after eight years of constant efforts, struggles, persevering contentions, distinguished by the most careful and prudent management in all respects, a great success was accomplished. The real estate was loaded with $65,000 of mortgages. The whole of the vast debt of $247,000 was extinguished. All the mortgages, except $14,000 were paid off, and the overburdened estate which, when it came into accountant's hands, was utterly insolvent, was saved and redeemed for the devisees and legatees named in the will, to the extent, as is alleged on behalf of the appellant, and not denied by the appellee, of several hundreds of thousands of dollars."

Wistar's Estate, 192 Pa. 289 (1899) is next cited. The condition and amount of that estate is thus described by the court, at p. 290: "There were upwards of fifty different pieces of real estate sold by the accountant. In almost every instance the properties were incumbered with mortgages, arrears of taxes, municipal liens, etc. This increased the labors of the accountant, as well as his responsibility, as it necessitated the paying off the mortgages as well as the other encumbrances in each case, and, of course, involved making settlements, not only with different purchasers, but also with mortgagees, the City of Philadelphia and other lien creditors. The amount of money that thus went through the hands of the accountant was considerably over $1,000,000." It was held that the accountant was entitled to 3½ per cent., or $35,000 compensation, for responsibility and trouble, or 1 per cent. for trouble.

The next case cited by the exceptant is Sunderland's Estate, 203 Pa. 155 (1902). The estate there amounted to $114,035.38—$50,000 of which consisted of an unconverted mortgage. The estate was given by the testator to his seven children. The court there allowed 2½ per cent. for responsibility, and 1 per cent. for trouble, on the whole amount of the estate. The character of the estate, and the measure of compensation, are shown in the opinion of Judge Penrose, at p. 156, where he said: "But

it is further objected that upon an estate so large as this, $114,035.38, composed of the mortgage referred to, and a few items collected in cash, an allowance of commissions at 5 per cent. is excessive, the estate being free from debt or complication, and, as the account shows, there being but eleven items of credit, including cost of filing account, commissions and counsel fees. This objection appears to be well founded: Pusey *vs.* Clemson, 9 S. & R. 204; Walker's Estate, 9 S. & R. 225; Whelen's Estate, 20 P. F. Smith, 410; Lang's Estate, 15 Philada. 593. Allowing, under Stevenson's Estate, 4 Wharton, 98, two and one-half per cent. for responsibility, an additional one per cent. will amply compensate the services rendered by the accountants as executors."

The next case cited by the exceptant is Young's Estate, 204 Pa. 32 (1902). In that case it appears that the personal estate amounted to $263,136.77. There was also about 1,700 acres of real esate. Under an agreement with the heirs, in whom the real estate had vested, the administrator carried on the business of farming. In his account, which was prepared under the advice of counsel, he mingled administration items with matters relating to the farming. This necessitated the appointment of an auditor. The auditor allowed commissions at the rate of 5 per cent. Upon exceptions, the court below reduced the commissions to 4½ per cent. Upon appeal to the Supreme Court the allowance was reduced to 3 per cent. At pp. 35-6, Mr. Justice Potter, speaking of the condition of the estate and the character of the administration, said: "In the present case, no unusual services were required of the administrator in connection with the personalty. In fact, the attention here bestowed was very slight. The investments in stocks and bonds, with few exceptions, remained unchanged and were distributed in kind. The time and labor spent in the discharge of what was properly the work of administration, was insignificant in comparison with that bestowed upon the conduct of the farms, which was carried on under the agreement with the heirs, and for which ample compensation was allowed by the auditor. * * * Under the circumstances of the case, an allowance of 3 per cent. upon the amount of personal property will be ample remuneration for the services rendered by the adminis-

trators." At p. 35, Mr. Justice Potter said: "The cases in Pennsylvania, in which an allowance of 5 per cent. has been sustained, where the estate amounted to $100,000 or more, are exceptional, as, for instance, in Lilly's Estate, 181 Pa. 478. There the circumstances were most unusual, as twelve of the thirteen residuary legatees were satisfied that the commissions claimed were reasonable, and filed with the auditor a request that they should be allowed." Young's Estate differs from this one, in that there the personal securities were not converted but were distributed to the beneficiaries in kind, and this case differs from the Lilly Estate in this that here at least one-half of the legatees have actively joined with the exceptant and the rest have remained passive, trusting to the court to take care of their legal interests.

The last case cited by the exceptant, is Sinnott's Estate, 231 Pa. 299, decided April 10, 1911. In that estate, Joseph Sinnott, the decedent, was a distiller. He appointed as his executors, the Fidelity Trust Company of Philadelphia and four individuals. He made an arrangement with the Trust Company, before his death, that its compensation should be one and a half per cent. of his estate. It was settled in the Orphans' Court of Montgomery County; and in disposing of the question of compensation to the individual executors for their services in the administration of the estate, Judge Solly stated the facts as follows: "The death of the testator caused a closing down of his vast business, because of the strict regulation of the United States Government. The distillery was closed, as well as the rectifying departments, at 242 South Front Street, in the City of Philadelphia. In order that the business might be resumed, it was necessary for the executors to obtain license from the court of Philadelphia, and from the court of Westmoreland County. It also became necessary for the executors to furnish large bonds to the United States Government. They were required to give bonds aggregating in amount about $2,500,000, and, as we understand, these bonds are required to be annually renewed. There were 40,000 barrels of whisky in the bonded warehouses at Gibsonton, and 30,000 barrels more belonging to customers. The decedent had established agencies in the cities of New York and Boston. Expert

accountants were retained to examine the books and accounts of the decedent's business, so that the executors might be properly informed of the situation. They retained Mr. John Sinnott as manager, as the testator expressly recommended, at a salary of $15,000 a year, and they placed Mr. Daly in charge of the business at Gibsonton. The importance of the business, the great responsibility resting upon the executors, their positive duty to manage it for the best interests of the estate, called for the best business judgment, and the executors, very properly, resolved themselves into a board of directors, so to speak, held regular meetings, kept full minutes of every proceeding, and acted upon full consultation and due deliberation. There were frequent consultations with the expert accountants, and the manager, and those in charge of the business at Gibsonton. The manager was required to furnish accounts of the business each month, and full and detailed statements every three months.

"There were daily consultations with the manager, and the executors' counsel. Many difficult questions arose day after day, requiring not only work and labor to solve, but also the application of the best business judgment. Under the laws of the State of Massachusetts, in order that the agency in the City of Boston might continue, ancillary letters on the estate were required. This involved additional labor and responsibility. Another matter of grave concern arose out of the failure of the Real Estate Trust Company of Philadelphia, the surety upon the bonds given by the executors to the United States. * * * This required the executors to find additional surety. * * * I further find the second and third accounts, are confirmatory of the conservation of the estate by the executors; that the executors performed a vast amount of unusual and extraordinary labor imposed upon them by the testator; and as the result of their management of the business, a net profit of over $500,000 is shown. Practically all the estate has been converted."

There were four individual executors; and they were allowed 2½ per cent. on the corpus of the estate, for all their services. The executors took credit in their account for compensation on the basis of 3½ per cent. Upon

exceptions, this was reduced by Judge Solly to 2½ per cent. Then, upon exception by the executors, he increased their allowance to 3½ per cent. The beneficiaries excepted to the increase, and appealed to the Supreme Court. Mr. Justice Stewart, in an opinion reversing the court below, said: "The decree allowing the appellees (the executors) three and one-half per cent. on the principal of the estate, is reversed; and it is now ordered and decreed, that they be allowed two and one-half per cent. thereon."

The accountant has submitted an elaborate brief, upon the question of compensation. Much of it is devoted to an examination of the cases cited in the brief of the exceptant, and to a comparison of the work done in those, with the work done in this case. Cases not on the exceptant's brief, are referred to; but as they are in general harmony with those cited by the exceptant, the only ones requiring special consideration are Gilpin's Estate, 138 Pa. 144, and Sunderland's Estate (No. 2) 203 Pa. 160.

In Gilpin's Estate, the facts are stated at p. 144 thus "On December 8, 1886, James H. McClain, executor of the will of John Gilpin, deceased, stated a first and partial account of the estate of his testator. In his account, the accountant charged himself with assets aggregating $92,183.91, of which the sum of $67,775.26, represented cash, actually collected. The credits claimed in the account aggregated $89,334.31, the cash expenditures included therein, amounting to $64,925.66.

"Said expenditures were for debts of the estate, annuities under the will, attorneys' fees, and other expenses, and the compensation of the accountant, being stated at $6,300.00. The accoutant was the law partner of the testator, at the time of the latter's death."

Mr. Justice Clark, of the Supreme Court, thus described the character and condition of the estate, at p. 149: "It is a fact well established, that the testator left his estate, in a most extraordinary state of confusion and complication. He was a lawyer by profession, and for twenty years or more prior to his decease, had been engaged in a large and lucrative practice. His individual affairs were confused with those of his clients. He had a peculiar way of doing business; he kept no regular books, trusting, perhaps, largely to his memory, and to loose

memoranda, which it was difficult, after his death to find, and, when found, even more difficult to understand.

"Mr. Gilpin died on November 3, 1883, and it was not until August 26, 1884, that the appraisers were able to file an inventory. This proved to be so imperfect, that a supplementary inventory was filed, on the 10th of October following; and notwithstanding the time that had then elapsed, and the efforts that had been made, other assets of the estate, were afterwards discovered, amounting to $19,000, and upwards."

At pp. 151-2, he continues thus: "The estate was large, and was involved in extraordinary difficulties; the responsibility was correspondingly great, and the accountant is entitled to receive compensation accordingly. The office of an executor is not to be undertaken for profit, but it is not to be expected that a business or professional man, will sacrifice his own business, and subject himself to the hazard without suitable remuneration. Compensation is the rule. The court in many cases, has said that five per cent. is the ordinary commission of an executor who has carefully managed the estate; more will not be allowed, without evidence of unusual services or responsibility." The accountant had taken credit for $6,300, as compensation. This was reduced to $4,650,—an allowance of five per cent. on the whole amount of the estate.

The central maxim of judicial judgment is, that "The law rises out of the fact;" and if the facts in the Gilpin estate were as stated by the court, and that must be assumed, the accountant there must have earned five per cent. for his services.

Sunderland's Estate (No. 2) is most imperfectly reported. All that we have upon the subject of compensation is the exception to the adjudication: "The learned judge erred in allowing the accountants commissions upon the unconverted mortgage;" and the statement in a syllabus: "Where an estate consists of $114,000, composed of a mortgage and a few cash items, and it appears that there are but eleven items of credit, including costs of filing account, commissions and counsel fees, an allowance of three and one-half per cent. commission on principal, is proper, and the rate should be allowed on the mortgage, although the mortgage has not yet been col-

lected." We are told here nothing about the amount of the mortgage, and nothing of the work done by he accountant, in the course of the administration. On the face of the account, his trouble would appear to have been little; and the allowance apparently inconsistent with the standard, in the majority of the cases cited above.

In Light's Appeal, 22 Pa. 448, Mr. Chief Justice Black said: "It is well established that an appeal does not lie to the confirmation of any, except the last administration account. There is but one final decree between the executor and the distributees or creditors, all others being merely interlocutory. However numerous the accounts are, the whole series are treated as one, and the last opens all the rest." A decedent's estate is an entire thing, and is to be dealt with by the executor and the Court as a unit. It is stated above that an executor is the personal representative of the decedent; and that implies an expectation in the testator that his executor shall be paid, according to the legal standard, for the work and trouble which his estate, as disposed of by his will, necessarily imposes upon his executor. If this lady had given her whole estate to one person, or as is so generally the case, had given it in equal shares to two, three, or other limited number of persons, she would have imposed comparatively little work upon her executor; and he could have carried out her mandate without much trouble or vexation. But her will contains forty-four dispositive items, to fifty pecuniary legatees, and specific bequests of chattels of which the following are samples:

"Thirty-fifth: I give and bequeath unto my nephew Charles W. Bowman, one dozen table spoons, marked 'D,' a soup ladle marked 'W,' one dozen forks marked 'S. L. K.,' fourteen oyster forks, my decorated china set, all Venetian glass and Dresden china, old-fashioned cake basket, oyster tureen, two round trays, baking dish, one dozen fancy dinner plates, one dozen orange spoons, one dozen salad forks, one dozen fancy soup plates and half of my bed linen; and I give to him also, together with his sister, Sarah B. Bell, the choice of oil paintings and furniture, bed and table linen and bedding, not otherwise herein specifically disposed of, the said Sarah to have the other half of my bed linen. * * *

"Thirty-ninth: I give and bequeath to Clara Parvin my mantel mirror in library, and sofa in study, my dining room clock, the set of pictures that belong in the dining room, the pair of large vases that are standing on the top of book case, also some table linen, two large water color pictures, one hanging in the hall and the other at the end of the parlor; also brussels carpet on third story of back building and oval table standing in hall, with such other pieces of furniture as she may choose.

"Fortieth: I give and bequeath unto Annie Kelley one dozen silver forks, such furniture as is not herein otherwise disposed of, and shall not be selected by my niece, Sarah B. Bell, and my nephew, Charles W. Bowman, or other legatees having a right to select."

These confusing dispositions doubtless furnished a fertile field for disputes between claimants. The testimony of the accountant shows the embarrassments entailed by conflicting demands of rival claimants, and his troubles are more easily imagined than susceptible of reproduction in description by one who did not participate in his personal experience.

The cases above established the following propositions of law: First, that the office of executor is not one of profit, but of mere compensation for responsibility and trouble; second, that for responsibility, his compensation is determinate, and is fixed at two and one-half per cent. of the amount of the estate administered; third, that in addition to his compensation for responsibility, he is entitled to further compensation for trouble necessarily imposed upon him by the nature and condition of the estate and the character, variety and multiplicity of duties necessarily performed by him in the course of his administration; fourth, that there is no legal rule or presumption that an executor is entitled to an allowance of five per cent. of the total assets of an estate administered by him, but that he is, in all cases, entitled to two and a half per cent. for responsibility, and, in addition to such compensation for trouble, as will fairly compensate him for his work and time, done and given to the administration; fifth, that in estates approximating $100,000 in value, of very complicated character, and where the administration has been extremely difficult and onerous,

five per cent. has occasionally been allowed, but no litigated and adjudicated case has been cited or found of an allowance of five per cent. where the estate exceeded in value $100,000; and, sixth, that, in the latter class of cases, i. e., those exceeding $100,000, the recent decrees of the Supreme Court have not gone beyond four per cent. in their allowance to executors for responsibility and trouble. I think these conclusions are justified by the decisions of the Supreme Court of our State, and this case will be disposed of with the conclusions in view. It is extremely important that executors and persons beneficially interested in estates should know what the law upon this subject is, as it is frequently transgressed, not always from improper motives, but frequently, as in this case, from an incorrect assumption as to the rule of law. This honest misconception of the law is referred to by Mr. Chief Justice Gibson, in Clemson *vs.* Pusey, supra, and by Mr. Justice Clark, in Gilpin's Estate, supra, where the assets were less than $100,000. I have been at great pains in this matter to do legal justice to this accountant, who, throughout his administration, has been so solicitous to do his duty to the wishes of the decedent, and to serve her beneficiaries to their advantage, and fear that I have thereby run this opinion to inordinate length.

My conclusion is, that the accountant, for his trouble in the settlement of this estate, has earned one and a half per cent. upon the amount of the estate administered, or a total compensation of four per cent. on $125,223.56—$5,008.94, and $200.00 for the briefs mentioned in the fourth finding of fact, making his entire compensation for responsibility and trouble $5,208.94.

One of the legatees, William Frazier Wootten, to whom was given the income of a fund for life, has died since the distribution of the balance in the first account. The said fund of $3,749.41 is included in this account. A claim is made by the residuary legatee that the principal of the legacy should be distributed to it. This claim can not be allowed, for the reason that the special legacies have not been paid in full. In the absence of expressed intention in her will, the law will apply testatrix's estate, first of all, to the primary objects of her bounty, the special legatees; and until they are fully satisfied, there can be no residuary estate. Distribution of the principal

of the legacy of William Frazier Wootten will, accordingly, be made on account of the special legacies.

Randolph Stauffer, Esq., attorney for the exceptant, has requested the Court to allow him an attorney fee out of the funds for distribution to the special legatees. As they all participate equally in the increased sum for distribution, which increase was brought about by the action of the exceptant, equity requires that all those taking the increased benefit shall bear equally the expenses incurred in the production of it. An attorney fee of 10 per cent. on the amount of the increase is fixed as the compensation to Mr. Stauffer; and that sum will be distributed to him as compensation for his professional services.

Allowing a credit of $5,208.94 for compensation for administration of the assets included in both of his accounts, I find a balance in the hands of the executor, for distribution, of $25,537.07.

The account, statement, copy of will, etc., are hereto attached: And it is ordered and decreed that Cyrus G. Derr, executor as aforesaid, do pay the distributions to the persons respectively entitled thereto.

January 10, 1912. This report is confirmed nisi.

DOTTERY *vs.* ALLENTOWN ELECTRIC LIGHT AND POWER CO.

Negligence—Act of God—Proximate Cause—Province of Court and Jury.

When, during an extraordinary rain, hail and wind storm, a tree fell upon electric light wires, causing them to come in contact with the metal sheeting on the front of a building, and thereby charging it with electricity, so that a person coming in contact therewith was killed, there can be no recovery of damages.

The fact that the wires might have been in too close proximity to the trees, and that the branches of the trees were not trimmed, would not have been the proximate cause of the accident.

Under such a state of facts, the question of defendant's negligence will not be submitted to the jury.

In the Court of Common Pleas of Lehigh County. Henry J. Dottery *vs.* Allentown Electric Light and Power Company. No. 96 September Term, 1911. Motion to take off Non-suit.

James L. Schaadt, Charles W. Kaeppel and William H. Schneller, for Plaintiff.

Reuben J. Butz and Arthur G. Dewalt, for Defendant.

Heydt, President Judge, 56th Judicial District, specially presiding. Union street in the city of Allentown runs east and west. At the place of the accident out of which this suit arises there was erected on the south side of Union street a two story double frame tarpaper roofed dwelling house with a metal front, being numbers 1008 and 1010. North of this double house there was an embankment about 9.3 feet high on which trees were growing. Defendant's pole line, carrying high-tension wires, extended along the south side of Union street.

On June 12, 1911, at about 8 P. M. an extraordinary rain, hail, and wind storm was raging, broke off a cherry tree standing on said embankment, blew it over on the defendant's line, so that the wires sagged (or broke) and came in contact with the metal sheeting on the front of building No. 1010, charging the same with electricity. Henry J. Dottery, Jr., coming out of the house on his way home, came in contact with the metal and was instantly killed.

Henry J. Dottery, the father, brought this suit against the defendant to recover damages.

At the trial a compulsory non-suit was entered which we are now moved to take off.

The defendant's negligence is thus charged in the plaintiff's statement:

"The plaintiff alleges that the defendant Company, not regarding the duties incumbent upon it in the conduct of its said business, was unlawfully upon Union street, aforesaid, with its poles and wires; was careless, reckless and negligent in planting its poles and stringing its wires so close to the metal-sheathed dwelling as aforesaid, and in such close proximity to the trees growing upon the opposite embankment, the branches of which were close to and overhanging the said wires, without trimming the same, and that in consequence of its unlawful occupancy of said Union street and through

its carelessness, recklessness and negligence as aforesaid, the said accident occurred whereby the plaintiff's son lost his life."

On the first of these charges, viz., that the defendant was unlawfully on Union street with its poles and wires, there was no evidence offered and this ground was abandoned. On the second charge, viz., that the defendant planted its poles and strung its wires too close to the building, the undisputed facts are that the defendant's pole line was erected for twenty years or more on its present location; that the building was erected during 1910; that the building was erected towards the line, not the line planted towards the building; and that the defendant's wires, while strung above the building, the wire closest to the building was ten feet above the roof on the east side and four feet above the roof on the west side.

Under these facts there was no negligence. This ground was not pressed upon the argument.

We have then left for consideration the third charge, viz., that the wires were strung in too close proximity to the trees growing upon the opposite embankment, and that the trees were not trimmed.

The facts are that Union street is, according to the city plan, forty-four feet wide between house lines; the plan calls for an eight feet pavement on the north side, and a ten feet wide pavement on the south side, leaving a twenty-six feet wide roadway; on the north side of the street is an embankment 9.3 feet high, leaving the traveled portion of the street including the sidewalk about twenty feet; on top of this embankment a cherry tree grew; it was located about eight feet south of the northern boundary line of Union street, fifty-eight feet west of the western line of house No. 1008 Union street, and about thirty-one feet north of the line of defendant's poles; the cherry tree was about eighteen inches in diameter at the base, and about four feet from the ground divided into two parts, each being about fourteen inches in diameter, one part leaning towards the east and the other towards the south; these parts were each about forty-five feet high; this cherry tree broke about four feet from the ground and one part fell upon defendant's line.

None of the branches were in contact with the wires.

There is no testimony which attempts to state definitely any distances which the branches were from the wires; there is some vague and indefinite testimony that the tree slanted towards the south and that its branches overhung the wires.

Under these facts, in connection with the positive testimony that this tree was not trimmed because there were no branches overhanging the wires, and that it was not necessary to trim this tree, and that to leave it was a perfectly safe thing to do, we are of the opinion that the plaintiff failed to prove any negligence on the part of the defendant.

If we should, however, concede for the sake of the argument, that the defendant was negligent in not trimming the tree, the plaintiff could not recover because such negligence was not the proximate cause of the accident. What was the proximate cause of the accident? The storm broke off the cherry tree and the tree knocked down the wires. It was a hail, rain and wind storm, "like a big tornado;" houses were blown down, roofs torn off and trees uprooted; it was the worst storm within the memory of the witnesses. The storm was an "Act of God." The defendant was not responsible for the storm; it was not bound to anticipate such a storm; it could not know that this particular tree (any more than any other tree along its line) would be broken off and blown down. Even if all the branches of this cherry tree on the south side had been trimmed, the tree would still have struck the wires with the same result. To make plaintiff's position tenable it would be necessasry to hold that defendant's duty compelled it to so trim and top trees that there would be no possibility, in the event of the trees being blown down by storm, for them to strike the line. No court has ever so decided, and the absurdity of the proposition becomes conspicuous upon a mere statement of it.

The plaintiff, however, strenuously argues that the court erred in entering the compulsory non-suit and that the court should have submitted the questions of the defendant's negligence, and of the proximate cause of the accident to the jury.

The rule, stated in many cases, is that where the facts are disputed or the inferences to be drawn from

them doubtful, both the questions of the defendant's negligence and of the proximate cause of the accident are for the jury; but that where the facts are undisputed and the inferences to be drawn therefrom free from doubt, it is the duty of the court to declare the law. In the case at bar there are no disputed facts, and hence nothing to submit to a jury.

In the case at bar the rule res ipsa loquitur does not apply; the burden was on the plaintiff to establish negligence on the part of the company: Lanning *vs.* Pittsburg Railways Co., 229 Pa. 575; Recap *vs.* Bell Telephone Co., 230 Pa. 597.

The plaintiff argues that the accident occurred through the defendant's negligence concurring with the storm, the superior force or Act of God, and that therefore the defendant is liable.

We are fully in accord with the proposition that if the death of plaintiff's decedent is caused by the concurring force of the defendant's negligence and the "Act of God" the defendant is responsible, provided the defendant's negligence was a proximate cause of the accident.

"It is universally agreed that, if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the 'act of God' or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage." Shearman & Redfield on Negligence (5th Ed.) Vol. 1, Page 42, Sec. 39.

The Supreme Court, per Justice Mestrezat, says in Recap *vs.* Bell Telephone Co., 230 Pa. 598:

"It appearing by the plaintiff's testimony that his injuries resulted from the act of God, the maxim (res ipsa loquitur) has no application, and a presumption of negligence does not arise. Actus Dei nemini facit injuriam. The burden was, therefore, on the plaintiff to produce affirmative proof of negligence which concurred with the act and effectively contributed to the accident. To create a liability on the part of the defendant it must have required the combined effect of the act of God and the concurring negligence to produce the injury."

The concurring negligence which, when coupled with

the act of God, produces an injury, must, in order to render a defendant responsible, be such as is in itself a real producing cause of the injury and not a merely fanciful or speculative negligence, which may not have been in the least degree the cause of the injury: B. & O. R. R. Co. *vs.* School District, 96 Pa. 65.

Where an injury is occasioned by flood or storm, the concurrence of negligence with the act of God in producing the injury, is necessary to fix liability. If the act is so overwhelming as of its own force to produce the injury independently of the negligence shown, the defendant owner cannot be made responsible: Helbing *vs.* Allegheny Cemetery Co., 201 Pa. 171.

For the reasons set forth in the foregoing opinion the motion to take off the compulsory non-suit must be denied.

Now, June 7, 1912, the motion to take off the compulsory non-suit is denied.

To which action of the court in this regard an exception is noted to the plaintiff and to him a bill is sealed.

STEIN ET AL. *vs.* BOROUGH OF MACUNGIE.

Condemnation—Waters—Cities and Boroughs—Acts of May 25, 1887, P. L. 267, and April 15, 1907, P. L. 90—Constitution.

The Act of April 15, 1907, P. L. 90, amending the Act of May 25, 1887, P. L. 267, authorizing cities and boroughs to condemn property and rights, for the purpose of obtaining and supplying water, so as to include springs, is constitutional.

The title gives sufficient notice, notwithstanding the fact that it does not refer to the proviso that no waters or springs appropriated shall be used so as to deprive the owner of certain rights.

In the Court of Common Pleas of Lehigh County. Annie Stein, Mamie Stein, Lizzie P. Davis and Frank K. Stein *vs.* Borough of Macungie. No. 60 April Term, 1908. Issue on Appeal from Report of Viewers.

Max S. Erdman and Francis G. Lewis, for Plaintiffs.
Horace W. Schantz, for Defendant.

Trexler, P. J., April 1, 1912. A number of reasons

for a new trial are assigned. They are principally directed to the refusal of the court to admit as expert witnesses certain persons called by the plaintiff. The parties called were clearly incompetent as they did not have sufficient knowledge to intelligently give an opinion as to the damages caused by the taking of plaintiffs' water. The most serious reason urged, although not referred to at the trial, is that the act under which the borough proceeded is unconstitutional.

The Act of 25 May, 1887, P. L. 267, is an act entitled "to authorize cities and boroughs to condemn property and rights inside and outside of their limits for the purpose of obtaining water."

Although the title is very wide in its scope, the body of the act limits the taking to "streams known as rivers or creeks, lands, easements and rights of way."

The Act of 15 April, 1907, P. L. 90, amends the above act. Its title is as follows: "To amend section one of the act approved May 25, 1887, entitled an act to authorize cities and boroughs to condemn property and rights inside and outside of their limits for the purpose of obtaining and supplying water," "so as to include springs."

The section amended is properly cited. The section as amended contains the added word "springs" and the following proviso:

"Provided that no waters or springs appropriated under the provisions of this act, shall be used in such manner as to deprive the owner or proprietor thereof of the free use of and enjoyment of the same at all times for any domestic, dairy, stock or farm purposes."

It is with the amendatory act we are concerned. The case was tried under its provisions, and the damages were ascertained subject to the owners' rights in the waters for certain purposes.

The plaintiffs contend that the subject of the act is not clearly expressed in its title as provided by Art. 3, Sec. 3, of the State Constitution.

There is no doubt the subject of the amendment is springs. The proviso applies not only to springs but to waters, and the legislative intent to extend the amendatory act to waters is not expressed in the title. But we need not consider that aspect of the case, for the case

before us was the taking of a spring. The term waters may be limited to waters contained in springs, or the word waters may be rejected entirely and the continuity of the language of the act, or its completeness of expression be in no wise affected. There are a large number of cases recognizing the latter method of construing such acts. Among them are Smith *vs.* McCartney, 56 Pa. 359; Com. *vs.* Casey, 43 Sup. 494, 498; Denhurst *vs.* City of Allegheny, 95 Pa. 437.

The question remains whether in order to meet the constitutional requirement the title of the act must give notice of the proviso reserving certain rights to the owners of the premises containing the springs. The title of amendatory or supplementary acts are liberally construed. Stroudsburg *vs.* Schick, 24 Sup. 442, and cases there cited. Where the title of the amendatory act specifies the nature of the changes made, its provisions are limited to the subjects specified in the title: Com. *vs.* Bender, 7 C. C. R. 620, citing Union Pass. Rwy. Co.'s Appeal, 81* Pa. 91, 95, Mauch Chunk *vs.* McGee, 87 Pa. 438, Dorsey's Appeal, 72 Pa. 192, Beckert *vs.* Allegheny, 85 Pa. 191. The test is that the title should be so certain as not to mislead. The purpose of the act we are considering is the inclusion of "springs" into the Act of 1887. The title need not be an index to its contents, and all details naturally and properly incident to the subject named need not be referred to in the title.

That the owner of the spring has certain privileges left to him does not offend against the principle. It is no new subject but deals expressly with the purpose of the act, and is germane to the same. There is no variance from the real subject of the act so as to mislead anyone but any person interested in the subject matter would be put upon his inquiry as to what is contained in the body of the act. Stroudsburg Boro. *vs.* Shick, 24 Sup. 442; Franklin *vs.* Hancock, 204 Pa. 110; Bridgewater Boro. *vs.* Bridge Co., 210 Pa. 105.

I consider the act of 15 Apl., 1907, P. L. 90, constitutional.

Now April 1st, 1912, the motion for a new trial is overruled.

WHIPPLE *vs.* BOWEN ET AL.

Corporations—Collateral Attack on Charter—Personal Liability of Officers.

One who deals with a corporation as such, cannot impeach its charter in a collateral proceeding by showing that conditions precedent to the existence of the corporation have not been complied with.

In a suit against individuals, the plaintiff declared upon a contract purporting to have been made by a corporation, claiming that it was in fact a partnership, and, that instead of there being a corporate liability, there was a personal liability. Held, that he could not recover, it not having been shown by suit against the corporation, that it was not liable.

In the Court of Common Pleas of Lehigh County. George N. Whipple *vs.* James K. Bowen and Gilbert H. Aymar, trading as Kinemacolor Company of America. No. 17 September Term, 1911. Assumpsit.

Arthur G. Dewalt, for Plaintiff.
Frank Jacobs, for Defendants.

Trexler, P. J., June 8, 1912. The plaintiff entered into an agreement with "the Kinemacolor Company of America, a corporation organized under the laws of the State of Pennsylvania with executive offices at Allentown, Pennsylvania" for the exclusive rights and license of selling kinematograph machines in the State of Massachusetts. The corporation throughout the agreement is referred to as "the company" and the agreement "shall be binding upon the successors and assigns of the company." The contract is executed by James K. Bowen "its President, being its agent thereto duly authorized" who signed it as follows:

"Kinemacolor Company of America,
by Jas. K. Bowen."

The consideration of the contract was receipted in the name of the Kinemacolor Company of America, Wm. E. Atkinson.

The said corporation was incorporated under the State of Pennsylvania, and its charter duly recorded. The plaintiff claims that although the contract purports to be made by a corporation it was in fact a partnership, and instead of there being a corporate liability, there is a personal liability. To do this, he proposed to show that the corporation was not duly chartered, and that the

president who signed the agreement on behalf of the corporation was not authorized.

It must be assumed that the corporation executing the contract was duly chartered. Its charter can not be attacked collaterally. One who deals with a corporation, as such, cannot impeach its charter in a collateral proceeding by showing that conditions precedent to the existence of the corporation have not been complied with. Johnson *vs.* B. & L. Assn., 104 Pa. 394. The very language of the agreement plainly states that the defendant is a corporation.

The corporation does not deny its liability. It has not had the opportunity so to do. The plaintiff declares upon a contract. The party to this contract is a corporation. If suit be brought against the corporation and it appears that the corporation is not bound by the agreement and that Bowen, its president, exceeded his powers to contract or had none, then he would be personally liable, but his liability does not exist, if the corporation be liable. If the money paid on the contract and receipted for by the corporation was not actually received by it, abundant remedies are found in the corporation laws, to have the matter straightened out.

Now June 8, 1912, the motion to take off non-suit is overruled.

Eo die, plaintiff excepts, and for him a bill is sealed.

TANDLICH *vs.* TANDLICH.

Divorce—Vacating Decree.

The Court has no jurisdiction to vacate or open a decree refusing a divorce, on the ground of after-discovered testimony, after the term at which it was entered

In the Court of Common Pleas of Lehigh County. Gertrude Kemp Tandlich *vs.* Samuel Tandlich. No. 31 October Term, 1911. Petition to vacate and re-open a decree refusing a divorce.

A G. Dewalt, for Libellant.

Trexler, P. J., June 14, 1912. The case of Egolf *vs.* Egolf, 4 Berks, 183, and authorities therein cited, decide

that the court has no power to vacate a decree refusing a divorce after the term at which it was entered, unless there be want of jurisdiction or fraud or imposition practised. In the case before us, the decree was entered Mar. 8, 1912. The application to vacate or reopen was made after the expiration of the term. The ground laid was after discovered testimony. The application came too late. Furthermore the testimony relied upon in support of the petition could have been produced at the first hearing, or if the witnesses were non-residents, resort might have been had to interrogatories as in other cases. Sturgeon's Pa. Law & Procedure in Divorce, Sec. 654.

Now June 14, 1912, petition dismissed.

AUCH *vs.* AUCH.

Divorce—Examination of Witnesses by Master.

The rule of court, providing that the Master shall first examine witnesses in divorce proceedings, is very salutary, and should be strictly observed.

In the Court of Common Pleas of Lehigh County. Rosa Auch *vs.* Christian Auch. No. 2 January Term, 1912. Divorce.

C. A. Groman, for Libellant.

Trexler, P. J. Now, April 29, 1912, it appears that the Master waived his right to examine the witnesses. Rules of Court Rule XVIII, Sects. 7 and 8, provide for the examination of the witnesses by the Master. Section 8 is very explicit. "Neither party shall be allowed to examine any witnesses called in his or her behalf until after the Master shall have finished his examination." The rule is very salutary, and I see no reason why it should not be strictly observed. Before refusing the divorce, I will allow the attorney for the libellant to be heard.

The Master has omitted to certify to the notes of testimony.

AMERICAN SILK CO. *vs.* MONARCH SILK CO.

Tax—Lien—Negligence.

The Auditor General's office neglected to file certificates in the Prothonotary's office of taxes due from the defendant corporation in the years 1905, 1906, 1907 and 1908 until Nov. 5, 1910, before which time a judgment had been duly entered by the plaintiff against the defendant, under which judgment execution was issued, and the property sold. Before the commissioner appointed to distribute the proceeds, the Commonwealth claimed priority over the judgment; but the commissioner disallowed the claim. Held, that exceptions filed to the report on these grounds must be dismissed.

The corporate loan tax is not a tax upon the corporation, but upon the individual holders of its securities. The liability of the corporation to the Commonwealth for failure to collect this tax is only an indebtedness, and does not fall within the provisions of the Act of June 7, 1889, P. L. 420, which gives a preference to taxes due the Commonwealth in the distribution of the proceeds of judicial sales.

Though the Act of Mar. 30, 1811, does not fix the precise time within which the tax settlement shall be made by the Auditor General, there is no doubt that annual settlements were in contemplation by the legislature, because the whole system of taxation in this Commonwealth is based on annual assessments and collections with provisions for returns to the Auditor General's department within the year.

Against the secret lien of overdue and neglected claims, of which the judgment creditor had no notice and no means of informing himself, he should be entitled to the protection of the law, even though the claimant be the Commonwealth itself.

In the Court of Common Pleas of York County. Exceptions to the Commissioner's report.

John F. Kell and Clarence B. Miller for Exceptions.
Niles & Neff, Contra.

October 30, 1911. N. M. Wanner, A. L. J.—The report of the Commissioner distributing the proceeds of the sheriff's sale of the real estate of the Monarch Silk Company, is excepted to, because he refused priority of lien and of payment to two corporate loan tax claims of the Commonwealth, one of which for $504.00 was filed November 4th, 1910, and the other for $1,003.20, on November 5th, 1910, and awarded the fund to the American Silk Company on its prior judgment of $57,860.62, which was entered of record October 7th, 1910.

The Auditor General's tax certificate for $504.00 covered unpaid corporate loan taxes for the year 1909, on loans of the Monarch Silk Company, and the settlement of the same was made November 2, 1910. The other cer-

tificate of $1,003.20, was for corporate loan taxes on similar loans, for the years 1905, 1906, 1907, and 1908, the settlement whereof was made May 10th, 1910.

This corporate loan tax is a personal tax imposed under the provisions of section 17th of the Act of June 7th, 1879, P. L. 112, and section 31 of the Act of June 7th, 1889, P. L. 420, upon the resident security holders of private corporations doing business within this Commonwealth. By section 4th of the Act of June 3rd, 1885, P. L. 193, which has never been repealed, it was made the duty of the treasurer of such corporation, to retain the amount of such tax out of the interest payable to such resident security holder, and to transmit the same to the treasurer of the Commonwealth.

For that service a statutory compensation was provided, and upon default to perform it, the corporation itself became liable to the Commonwealth for the amount of the uncollected tax, together with the penalty prescribed by the statute, Comth. *vs.* Wilkesbarre & Scranton Ry. Co., 162 Pa. 614.

This makes the corporation the responsible agent of the Commonwealth for the collection of this tax. But its resulting liability for a default is not a tax eo nomine.

The corporate loan tax was not imposed upon the corporation itself, but directly upon each of its individual security holders resident within the Commonwealth; Comth. *vs.* Lehigh Val. R. R. C., 186 Pa. 235; Comth. *vs.* Del. Div. Canal Co., 123 Pa. 594-618; Comth. *vs.* Lehigh Val. R. R. Co., 129 Pa. 449.

For that reason, the indebtedness of the corporation to the Commonwealth for the failure to retain and transmit the taxes due from the individual bond holders does not seem to fall within the provisions of sections 31 and 32 of the Act of 1889, supra, under which alone the Commonwealth claims priority.

Said sections provide as follows: "That all taxes imposed by this act shall be a lien upon the franchises and property, both real and personal, of corporations, companies, associations, joint stock associations and limited partnerships, from the time the said taxes are due and payable; and whenever the franchises or property of a corporation, company, association, joint-stock association or limited partnership shall be sold at a

judicial sale, all taxes due the Commonwealth shall be first allowed and paid out of the proceeds of such sale, before any judgment, mortgage or other claims which shall be entered of record or become a lien after the passage of this act."

"That no corporation, company, joint-stock association, association or limited partnership made taxable by this act, shall hereafter be dissolved by the decree of any Court of Common Pleas, nor shall any judicial sale be valid or a distribution of the proceeds thereof be made, until all taxes due the Commonwealth have been fully paid into the state treasury, and the certificate of the auditor general, state treasurer and attorney general to this effect filed in the proper court, with the proceedings for dissolution or sale."

These sections were intended to give priority only to taxes as such, which had been levied directly upon a corporation but this statutory liability is more in the nature of a penalty for neglect of duty, than of a tax. This was the view taken by the lower court, and affirmed by the Supreme Court in Comth. *vs.* Wilkesbarre and Scranton Ry. Co., 162 Pa. 614-621, and seems also to be in accord with the conclusions reached by the Court in Comth. *vs.* Lehigh Val. R. R. Co., 186 Pa. 235-246.

In the Wyoming Valley Ice Company's case, 145 Federal Rep. 268, Archbald, J., after reviewing the Acts of Assembly and the decisions of the courts on this subject, concluded, that to be entitled to a priority, the tax must be one which was directly due the Commonwealth from the corporation itself as a tax, and not as a mere liability for a failure to collect it from the party on whom it was assessed. These rulings seem to be conclusive of the question before the court, and fatal to the Commonwealth's claim for priority in this case.

But it is contended by the judgment creditors, that even if these tax certificates fell within the provisions of sections 31 and 32 of the Act of 1889, the right to priority is no longer an open question.

In Gladden *vs.* Chapman, 188 Pa. 586, the Court, after reviewing the Acts of March 30th, 1811, 5 Smith's Laws 231; the Act of April 16th, 1827, P. L. 472; the Act of June 7th, 1879, P. L. 112, and the Act of June 1st, 1889, P. L. 420, concluded that the Act of 1827, requiring the

filing of certified tax settlements in the prothonotary's office had not been repealed by the subsequent acts relating to corporate loans and corporate loan taxes, and that its filing was necessary to give priority to tax settlements as against other liens.

In Arnold's Estate, 46 Pa. 277, it was expressly held, re-affirming the earlier case of Wilson *vs.* Comth., 12 Pa. 164, that the Commonwealth tax claims have no priority over liens entered prior to the filing of the Auditor General's tax certificates.

In Wililam Silson, etc., Estate, 150 Pa. 285 (decided in 1892), the Court observed, that the reasons of public policy adverse to secret liens are quite as applicable against taxes created by the Act of 1879, or any other acts, as they were against such liens under the Acts of 1811 and 1827.

If these cases are to be held authoritative to the full extent of the language used therein, this judgment was clearly entitled to priority over the tax liens of the Commonwealth in this distribution.

The Commonwealth relies upon the Common Pleas case of Darlington *vs.* The Marshall-Kennedy Milling Co., 18 Pa. Dist. Rep. 1035, in which the Court observed that in the cases above cited, no certificate of tax settlements had been filed at all, and it was therefore doubted whether they were conclusive of the question of the priority of the tax liens in cases where the filing had only been delayed, until after the entry of other liens.

In that case priority over an older mortgage was given to one corporate loan tax claim, because the Auditor General's certificate had been promptly filed after the tax settlement was made as required by the Act of 1827. Another claim was disallowed because said filing had been delayed several years after the tax settlement was made. But the rule of law against the enforcement of secret liens has not been limited in the reported cases to instances of non-compliance with specific statutory provisions.

It rests on broader and more fundamental grounds of public policy. It is just as much against natural justice and equity, and just as subversive of public and private business security to subject a prior judgment creditor to a secret lien in the one case, as in the other. Though the

Act of 1811, supra, does not fix the precise time within which the tax settlement shall be made by the Auditor General, we have no doubt that annual settlements were in contemplation by the legislature, because the whole system of taxation in this Commonwealth is based on annual assessments and collections with provisions for returns to the Auditor General's department within the year.

We see no sufficient ground, therefore, for a distinction between a delay in making tax settlements and a delay in filing certificates of the same. It is, in our opinion, equally against the policy of the law and the decisions of the courts in either case, to preserve a secret lien of such taxes as against other lien creditors.

This question, it may be observed here, is not ruled by the cases holding that as between the Commonwealth and the delinquent tax payer himself the latter cannot be permitted to take advantage of the neglect or delay of the Commonwealth's officers charged with the collection of the taxes.

On the 7th day of October, 1910, when this judgment was entered, no liens of any of these taxes had been filed, though they were unpaid from 1905 to 1909 inclusive, and though settlement of those of 1905 to 1908 inclusive had been made as early as May 10th 1910. These latter had, therefore, lost their priority, even under the ruling of the Court in the case of Darlington *vs.* Marshall-Kennedy Milling Co., supra.

Although the taxes for 1909 had been overdue for more than nine months, no actual settlement of them had yet been made on October 7th, 1910, when this judgment was entered. Against the secret lien of such overdue and neglected claims, of which the judgment creditor had no notice, and no means of informing himself, he should be entitled to the protection of the law, and we are of the opinion, therefore, that this case falls within the intent and purpose of the rulings of the courts above cited.

The exceptions to the report of the commissioner are dismissed at the cost of the exceptant, and said report is hereby confirmed.

MOMEYER *vs.* DIRECTORS OF HOME FOR DESTITUTE.

Constitutional Law—Act of May 7, 1907, P. L. 170—Appropriation of Public Money for Private Purposes.

The amending act of May 7, 1907, P. L. 170, extending the provisions of the act of March 31, 1905, P. L. 92, providing for medical treatment for "all needy persons" who may be suffering from hydrophobia, to "all persons who may apply for aid," in its intended operation is for the purpose of requiring the public money to be expended for a solely private purpose and therefore void for lack of constitutional power in the legislature to enact it, offending Art. 111, Sec. 18 of the Constitution.

The plaintiff brought suit under the act of May 7, 1907, P. L. 170, to recover from the poor district the expense of Pasteur treatment for hydrophobia for himself and which he had previously paid as his own personal debt. Held, that he could not recover, because the purpose of the act was to authorize the discharge of a private obligation at public expense and therefore void.

Assumpsit. Demurrer to statement. Common Pleas of Westmoreland County. No. 300 May Term, 1910.

S. W. Bierer, for Plaintiff.
McGeary & Marsh, for Defendant.

McConnell, J.: Aug. 27, 1910—The plaintiff claims to have stated a case under the Act of May 7, 1907, P. L. 170, which act purports to amend Sec. 1 of "an act providing for the necessary medical attention of persons who may be in danger of suffering from hydrophobia," approved March 31, 1905, P. L. 92. The original act consists of but one section, which in its operative part provides that "it shall be the duty of the proper officers of the several poor districts in such counties to provide all needy persons in their said several districts, who may be bitten by dogs suffering from hydrophobia or rabies, with the proper medical attention to prevent the development of the disease in the person or persons so bitten, which medical attention may include the treatment known as the Pasteur treatment."

The amending act sought to make that section read, "It shall be the duty of the proper officers of the several poor districts in such counties, at the expense of such poor districts, respectively, to provide all persons who may apply for aid in their several districts, who may be bitten by dogs or other animals suffering from hydro-

phobia or rabies, with the proper medical attention to prevent the development of the disease in the person or persons so bitten, which medical attention may include the treatment known as the Pasteur treatment."

The italicized words indicate the points of change sought to be effected; the beneficiaries under the original act were to be "all needy persons," but the beneficiaries under the amendment were to be "all persons who may apply for aid." There can be no doubt but that this was the main point of change which the legislation sought to effect, if we were to look at nothing but the titles to the two acts; the title to the original act, as quoted above, shows that the attention to be furnished was for needy persons, but the title to the amendment act recites its purpose to be "to amend Sec. 1 * * * so as to include all persons who may apply for aid," therefore, the necessities to be considered on affording the aid applied for no longer include the financial condition of the patient, but solely the fact that he has been bitten and has applied for aid. The defendant is an auxiliary of the state in the administration of the poor laws; but, prima facie, it has nothing to do with the enlarged class of persons for whom it is to be now obliged to furnish medical attention. It is the design of this act to take from the public treasury money collected by taxation and devote it to a purpose heretofore unauthorized by the legislation of this state. That the state in the interest of the public may provide laws to prevent the spread of contagious diseases is undoubted, but the end to be effected by aid of the medical attention to be furnished at the public expense under this amended act has no relevancy to any alleged disease liable to become epidemic, but effects or purports to effect a purpose not general, but solely personal to the patient, for it is the ultimate end of the provision "to prevent the development of the disease in the person or persons so bitten." That the state may provide for those unfortunates who cannot take care of themselves and who, by reason of poverty or disease, must be otherwise maintained, is equally clear; but that basis no longer exists, for the statute under consideration has eliminated it entirely. Placing two acts in juxtaposition, we stand in view of the clear proposition in statutory form, to pay, at public

expense, for medical attention to be furnished to a person able to pay for it himself, which attention is designed, not as a matter of public protection, or of public charity due to those who are helpless or destitute, but solely to prevent, hereafter, the development of an apprehended disease in the person making application, because he has been bitten by a mad dog or other animal affected with the rabies. The mandate of this law is that the public must furnish this aid merely because such a person has applied for it. As stated above, the protection of the public from contagious diseases, the protection of the public by the prevention of vagrancy and other things which work to the public hurt and the prevention of the exhibition of those things which excite public sympathy by reason of unavoidable poverty, in those who cannot help themselves, and the protection of the public against criminal classes, are all forms of protection easily referable to the exercise of the public power of the state, but the purpose of this act is not a public purpose, in the sense that the exercise of any of the foregoing recognized functions of government embodies a public purpose. The trouble about this act of assembly seems to be that it attempts to appropriate public funds to uses which begin and end with the affairs of private persons. The statute does not, at all, go on the theory that the public health is to be protected, or that the beneficiaries are helpless or destitute, and therefore objects of public charity, but solely upon the theory that when this particular kind of aid is asked for it is to be rendered solely for the benefit of the individual who asks for it. In general, the power of the legislature is unlimited, with respects to taxation; but it has this limitation, that it can only impose taxes, or authorize the distribution of collected taxes, to purposes which are public. No matter how clear the intent of the legislature may be made in the statute, the statute has no legal potency if the end sought is to subserve a private purpose alone, for the legislature is destitute of constitutional power to enact such a law. "The question whether the interests of the public are sufficiently involved to justify the exercise of the taxing power is, in the first instance, for the legislature to decide; but since the requirement of a public purpose in taxation is a limitation upon the power of the

legislature, the courts must ultimately decide whether the legislature has overstepped its constitutional powers, and whether the purpose is public or private." 27 Encyc. of Law 627. The attempt in this act is to control the use of money raised by taxation. The defendant has such power under the act as the legislature had to give in the premises; it can have no greater power or authority. If the legislature lacked power to enact the law, there is no law. "By taxation is meant a certain mode of raising revenue for a public purpose in which the community that pays it has an interest. The right of a state to lay taxes has no greater extent than this. An act of the legislature authorizing contributions to be levied for a mere private purpose, or for a purpose which, though it be public, is one in which the people from whom they are exacted have no interest, would not be a law, but a sentence commanding the periodical payment of a certain sum by one portion or class of the people to another. The power to make such order is not legislative, but judicial; and was not given to the assembly by the general grant of legislative authority." Sharpless *vs.* Mayor of Philadelphia, 21 Pa. 147, Chief Justice Black, on page 168, says: "Neither has the legislature any constitutional right to create a public debt, or to lay a debt, or to authorize any municipal corporation to do it, in order to raise funds for a mere private purpose. No such authority passed to the assembly by general grant of legislative power. This would not be legislation. Taxation is a mode of raising revenue for public purposes. When it is prostituted to objects in no way connected with the public interests, or welfare, it ceases to be taxation and becomes plunder. Transferring money from the owners of it into the possession of those who have no title to it, though it be done under the name and form of a tax, is unconstitutional for all the reasons which forbid the legislature to usurp any other power not granted to them." In the case of Faas *vs.* Warner, 96 Pa. 215, an attempt had been made to authorize payment out of public funds of the personal debt of an ex-official, but it was decided that it was beyond the constitutional power of the legislature to do this. Justice Green, on page 218, says: "In such circumstances, an act of the legislature directing the county to pay, i. e., the debt of the ex-

official, is of no more validity than would be an act directing the county to pay the debt of any private citizen. Such legislation is void for want of constitutional power to enact it." In 1 Dillon on Municipal Corporations, 4th ed., Sec. 508, this doctrine is laid down: "It may be regarded as a settled doctrine of American law that no tax can be authorized by the legislature, for any purpose which is essentially private, or to state the proposition in other words, for any but a public purpose." Again in Sec. 736: "A public use or purpose is of the essence of the tax." In the case of Attorney-General *vs.* Eau Claire, 37 Wis. 436, Chief Justice Ryan said: "Taxation is the absolute conversion of private property to public use, and its validity rests on the use. In legislative grants of power to municipal corporations, the public use must appear * * The legislature can delegate the power to tax to municipal corporations for public purpose; and the validity of the delegation rests on the public purpose. Were this otherwise, as was said at the bar municipal taxation might well become municipal plunder." Smith on Municipal Corporations, Sec. 1480, says: "Whether general or local, taxation must be for a public and not a mere private purpose; and though sanctioned by state statutes, if it be not for a public use, it is an unauthorized taking of private property." In Philadelphia Association for the Relief of Disabled Firemen *vs.* Wood, 39 Pa. 73, what is a tax law and what is not is thus expressed: "A tax is a legislative enactment which defines the measure of every man's duty in support of the public burdens, and provides the means of enforcing it. But a requisition or decree that one class of men shall pay a portion of their earnings to another, no matter how benevolent or worthy, is not taxation, nor even legislation, such as this court will enforce." In Wisconsin Keeley Institute Company *vs.* Milwaukee County (A Wisconsin case), 36 L. R. A. 55, it was decided as follows: "The police power does not sustain a statute which is for the benefit of private parties by providing for the treatment in private institutions of habitual drunkards who are not financially able to pay for their own treatment. A county cannot be compelled by a statute to pay for the treatment in a private institution of habitual drunkards, merely because they are pecuniarily unable to procure and pay for such treat-

ment, since such use of the public money is not for a public purpose." Although there was in that case an attempt to confine the beneficiaries to those financially unable to procure the treatment, it was nevertheless held that it was but an attempt to appropriate public moneys to private uses, and therefore not within the constitutional power of the legislature. In the course of the opinion Chief Justice Cassady says: "The act in question does not go upon the theory that the victim of such addition is helpless and destitute, and hence the subject of public charity. It does treat such addition as a 'disease;' but it does not treat it as a contagious or infectious disease, and there is no allegation or claim that it is a contagious or infectious disease. The question recurs whether any county may be compelled to pay any private party for treatment, medicines and board of any resident therein, having a disease not contagious or infectious, merely because such diseased person 'has not the means to pay for such treatment.' If a county may be compelled to make such payment for such treatment, medicines and board of a person having such a disease, then it logically follows that every county may be compelled to pay private parties for treatment, medicines and board of any person having any disease, though not contagious nor infectious, provided the victim has not the present means of making such payment for himself. We are clearly of the opinion that no such power exists." The same court, in the case of State ex rel. Garret *vs.* Frohlich, 94 N. W. 50, passed on the validity of a law passed subsequently to the decision above cited, designed to pay innocent purchasers of unpaid county orders, for the payment of the expenses of habitual drunkards, which orders had been issued prior to the holding of the act unconstitutional; but this latter act was also held to be beyond the power of the legislature to enact: "Laws 1901, 695 C. 468, cannot be upheld as making an appropriation for the payment of claims founded in equity and justice, or in gratitude or charity; the appropriation being essentially an appropriation from the general fund of the state to pay claims growing out of a private transaction." The whole question is there fully considered and elaborately discussed in view of many authorities cited in the opinion.

The whole purpose of the act is to authorize the dis-

charge of mere private obligations at public expense. In addition to being unconstitutional for the reasons specified in Sharpless *vs.* Philadelphia, and the other authorities cited, its enactment is violative of the spirit of Art III, Sec. 18, of the Constitution, which reads as follows: "No appropriations, except for pensions or gratuities for military services, shall be made for charitable, educational or benevolent purposes to any person or community, nor to any denominational or sectarian institution, corporation or association." If the statute is not for any public purpose—as it clearly is not—it cannot stand as a mere act of public benevolence to the designated beneficiaries.

In this case we are not called on by a case of mandamus to compel the defendant to perform an alleged statutory duty. The statute purports to make it "the duty of the proper officers of the several poor districts * * * to provide all persons who may apply for aid * * * with the proper medical attention," etc. At the time the notice was first given to the defendant—as appears by the statement—the plaintiff had already provided for himself the proper medical attention, and had been engaged in undergoing the procured treatment for upwards of six days. The defendant had no opportunity to "provide" what the act prescribes, but is now in this case asked to pay for what the plaintiff had "provided for himself," and to make such payment not to the party furnishing the treatment, but to the plaintiff himself, for the purpose of reimbursing him for having paid for the treatment which he himself had procured for himself, and had previously paid as his own personal debt.

We cannot see that the intended operation of the act of 1907 (and particularly is this clear under the special facts of this case) was for any other purpose than to require "public" money to be expended for a solely "private use," and it is therefore void for lack of constitutional power in the legislature to enact it. Without the existence of that statute as a valid law there is no case set up in the statement showing any legal liability. It follows that the demurrer must be sustained. It is accordingly so ordered.

KILLEN *vs.* PEER, ET AL.

Justice of the Peace—Judgment—Parties Must be Named—Addition of Names—Husband and Wife.

A justice of the peace having given judgment against "D. M. Peer and wife," and a transcript having been entered in the Court of Common Pleas and a Scire Facias to revive and continue the lien thereof having been issued, the name of the wife having not been mentioned until judgment was taken thereon against "D. M. Peer and Emeline Peer his wife," a rule to show cause why the name of Emeline Peer, appearing in the judgment and subsequent proceedings thereon, should not be stricken off, will be made absolute and the name stricken off.

Parties to an action must be designated by name, and not by mere description.

There is authority for the addition of the names of terre-tenants through the various writs of Scire Facias that may be issued, but there is no authority for the adding of the name of a defendant who was unnamed in the original transcript, present in the files of the court for lien and execution only, although Acts of Assembly clothe the Court of Common Pleas with the power to make amendments when an appeal comes in from the record of a justice.

In the Court of Common Pleas of Westmoreland County, No. 569 May Term, 1909. Rule to show cause.

Moorhead & Smith, for Plaintiff.
Kline & Kline, for Defendant.

McConnell, J.:—This case came before the court originally on a motion for judgment for want of a sufficient affidavit of defense. After the original affidavit of defense had been filed, a supplementary one was also filed. By reason of what appeared in these affidavits, it was conceived by the court that, inasmuch as the name of Emeline Peer appeared as a party defendant in judgment wherewith this Sci. Fa. connects itself as a successor, it would be necessary to consider whether, as to Emeline Peer, such judgments had any legal existence.

A rule was thereupon granted on plaintiff to show cause why the name of Emeline Peer appearing in the judgment at No. 727 May Term, 1894, and in all subsequent proceedings consequent thereon, should not be stricken out. That rule now comes up for determination.

The case first found its way into this court by the filing of a transcript of a judgment recovered before a justice of the peace in a case entitled: "S. H. Killen *vs.* D. M. Peer and wife." The name of Emeline Peer nowhere appears in the transcript. It is not specifically

said that the summons had been served on any person so named. The record entry is that the summons was "returned under oath by constable served April 20th, 1889." Then follows this entry: "Now April 27th, 1 P. M. o'clock parties all present. Plaintiff presents his books of original entry and swears to the correctness of his account and defendant having off-sets for the bill, judgment is entered for the plaintiff in the sum sixteen dollars and fifty-nine cents and costs of suit." The transcript of the justice's judgment was entered in the Court of Common Pleas, at No. 833 May Term, 1889, under the Act of Assembly authorizing such entry for the purpose of lien and execution. The record in the Common Pleas at that number and term followed the justice's record, and nowhere in it mentioned the name of "Emeline Peer" as a party defendant. A Sci. Fa. to revive and continue the lien of the judgment entered on the transcript was issued to 727 May Term, 1894, and her name nowhere appeared therein. The Sheriff in his return to that writ does not name her as a party defendant, but inter alia, it shows a service on "Mrs. Peer wife of D. M. Peer" by giving her a true and attested copy. However, judgment was taken in that proceeding for want of an appearance "against D. M. Peer and Emeline Peer his wife." The name of Emeline Peer was thus first introduced on the record, and it has been carried along in later proceedings to revive at No. 10 May Term, 1899; No. 359 May Term, 1904, and in this writ of Sci Fa., at No. 569 May Term 1909, whereto she first filed her affidavit denying that she was a party. "A scire facias sur judgment must follow the original judgment in amount, date and parties; a failure in this respect is decisive against the admissibility of the record on a plea of nul tiel record." Richter *vs.* Cummings, 60 Pa. 441; Dietrich's Appeal, 107 Pa. 174. "The court below had no power to enter a judgment against one not a party to the suit, and that such a judgment was, therefore, a mere nullity." Overstreet *vs.* Davis, 24 Miss. 393. "Parties to an action must be designated by name and not by mere description." 15 Ency. Pl. & Pr. 478.

Acts of Assembly clothe the Court of Common Pleas with power to make amendments when an appeal comes in from the record of a justice, but, with respect to a

transcript of this kind, it is present in the files of the court for purposes of lien and execution only, and the court has no authority to make the justice's judgment comprehend parties not comprehended in the judgment entered by him. Did he make Emeline Peer a party defendant? It seems quite clear that he did not. "Parties must be designated by name and not by mere description of the person in the process and judgment. The use of the words 'and wife,' following the name of the defendant in the summons issued by the justice, and in the marginal statement of the judgment, does not make the wife a party. On an appeal in such a case to the city court, the plaintiff properly files his complaint against the defendant alone, who was designated by name in the Justice's summons; to have declared against both would have been a departure from the process issued by the justice and from the judgment he had rendered." Sossman *vs.* Price, 57 Ala. 204. Brickell, C. J., page 205, inter alia, says: "Parties must be designated by name and not by a mere description of the person, in the process and in the judgment. The words 'and wife' following the name of the appellant, Henry Sossman, in the summons issued by the justice, and in the marginal statement of the parties to the judgment, did not make his wife a party. He was the sole defendant in the process, and in the judgment. On the appeal, the plaintiff properly declared against him alone. If he had declared against the wife by name, jointly with the husband, it would have been a departure from the process issued by the justice, and from the judgment he had rendered." Our own case of Doerr *vs.* Graybill, 24 Sup. 321, is to the same effect. The syllabus is as follows: "Where a judgment has been recovered before a justice of the peace against defendant and wife, without naming the wife, and the plaintiff thereafter files a transcript of the record of the justice in the common pleas, and no attempt is made before the justice of the peace to amend the record, so as to make the wife a party by name, the court of common pleas is without jurisdiction to amend the record so as to add the name of the wife as a party. In such a case the judgment on the transcript as filed is a judgment against the husband alone."

A judgment unamendable by the Court of Common

Pleas, is filed in that Court, solely for the purpose of lien and execution. To the judgment entered before the justice, Emeline Peer was not a party—for she was not anywhere named as such. The writs of Sci Fa. issued in this court since the filing of the transcript herein are but to revive the lien of a judgment having such parties, and only such parties, as the case before the justice had. Emeline Peer was not a party to the judgment before the justice, and this court is bound to so construe the transcript which constitutes the basis of all that has been done in this court. There is no place along the course of the proceedings in this case where this court, by the exercise of its legal powers, can lawfully make or sanction the making of Emeline Peer a party. The "and wife" in the justice's proceedings constitute a nullity in so far as she is concerned. Nothing has transpired which estops Emeline Peer from saying that those words are a nullity, in so far as making her a party is concerned. There is authority for the addition of the names of terretenants through the various writs of Sci Fa. that have been issued, but there is no authority for the adding of the name of a defendant who was unnamed in the original transcript.

It will be noticed that the cases above cited go upon the ground that the wife is not a party to the proceeding. Some emphasis is placed on the fact that the transcript says "parties all present" and it is argued that "Emeline Peer" must, therefore, have been present at the trial before the justice. But why should we so conclude? That language is as readily satisfied by the fact that S. H. Killen and D. M. Peer—who are indeed parties—were present, as by the fact that some unnamed person was also present with them. If we are not permitted to say that any persons except S. H. Killen and D. M. Peer are parties to the judgment, we are bound to construe "parties all present" as having reference to them alone; and especially is this conclusion warranted when the justice's transcript actually refers to "defendant" in the singular number.

And now, 27 August, 1910, after due consideration, the rule granted on the 5th day of February to show cause why the name of "Emeline Peer" appearing in the judgment at No. 727 May Term, 1894, and in all sub-

sequent proceedings thereon should not be stricken off at the cost of the plaintiff is made absolute. The rule for judgment for want of a sufficient affiidavit of defense is discharged.

CHARLES F. LEE *vs.* CAROLINE HAMILTON.

Tenants in Common—Act June 24, 1895, P. L. 237—Effect Thereof—Judgment Against Tenant in Possession—Equitable Rights of Co-tenant,

The Act of June 24, 1895, P. L. 237 furnishes effective and highly necessary remedial legislation for the adjustment of the rights of tenants in common in relation to the use and occupation of property held jointly.

In partition proceedings a tenant in common is entitled to the amount of his proportionate share of rent of the land regardless of a judgment entered against the co-tenant in possession.

The lien of a judgment is subject to all the equities which were held against the land in the hands of the judgment debtor at the time the judgment was rendered, and these will be protected by the courts of equity as against the judgment lien, so that the latter may be confined to the interest remaining in the debtor after due recognition of the outstanding equities in their proper order.

Partition—Master's Report—Counsel Fees—Act of April 24, 1864, P. L. 641.

A master in partition has no power to allow any fee to the plaintiff's attorney. The compensation is for the plaintiff and must be taxed by the court in accordance with the Act of April 27, 1864, P. L. 641.

The "reasonable allowance" for counsel fees contemplated by the act does not include expenses of adversary proceedings resulting from a defense to plaintiff's demand for partition, or from any other cause, but only reasonable compensation for services of counsel necessarily rendered for the common benefit of all the parties in interest.

Exceptions to master's report. In the Court of Common Pleas of Lackawanna County. No. 2 October Term, 1911. In Equity.

H. D. Carey, for Plaintiff.
R. A. Zimmerman, for Defendant.

Edwards, P. J., June 10, 1912. The first exception to be considered relates to the meaning and effect of the Act of June 24, 1895, P. L. 237, entitled "An Act to pro-

vide for the liability of tenants in common in possession to their co-tenants out of possession." The act consists of one section which reads thus:

"That in all cases in which any real estate is now or shall be hereafter held by two or more persons as tenants in common, and one or more of said tenants shall have been or shall hereafter be in possession of said real estate, it shall be lawful for any one or more of said tenants in common, not in possession, to sue for and recover from such tenants in possession his or their proportionate part of the rental value of said real estate for the time such real estate shall have been in possession as aforesaid; and in case of partition of such real estate held in common as aforesaid, the parties in possession shall have deducted from their distributive shares of said real estate the rental value thereof to which their co-tenant or tenants are entitled."

In the interpretation of an Act of Assembly it is the duty of the Court to ascertain and give full effect to the intention of the legislature, and to give the words of the act their plain and ordinary significance. There is nothing ambiguous or uncertain in the act now before us. The legislative intent is expressed in simple words and phrases, and there should be no difficulty whatever in reaching a conclusion as to the meaning of the act. Nevertheless a question has been raised in several Common Pleas Courts as to its application under certain conditions and circumstances. In the case of Stamm's Estate, 17 D. R. 863, the Court held that the Act of 1895 was of a declaratory character and only supplied a remedy which did not exist at common law. The opinion states that "the history of judicial interpretation of radical legislative enactments exhibits a deliberative attitude on the part of courts," and that "influenced by conservative habits of thought they reluctantly let go of the old and cautiously take up the new." We cannot see that the Act of 1895 is in any sense radical. It provides a simple remedy for the protection of tenants in common, out of possession of land, against those in possession who have enjoyed the full benefits of the common property, and it specifies a fair standard of liability, viz., the proportionate share of the rental value. We find a disinclination to give full effect to the act in question in the opinion

of Judge Woodward in the case of Jevons *vs.* Kline, 9 Kulp 370, wherein he holds that as to rents between tenants in common the act does not apply "for the reason that the plaintiffs and defendant were all, in contemplation of law, in possession of the real estate involved in the partition," unless the possession by one tenant be attended with circumstances demonstrative of an adverse intent, such as a refusal of a demand by the co-tenant for his share of the rent. Judge Woodward refers to the case of Norris *vs.* Gould, 15 W. N. C., 187, of which Mr. Justice Mitchell states: "The best summary of the law in our own books will be found in the admirably clear and accurate opinion of Judge Thayer in Norris *vs.* Gould." But, this case was decided in 1884, and it states the law on the subject as it was at that time. The commendation of Judge Thayer's opinion is found in Gas Co. *vs.* Transit Co., 172 Pa., 421, which case is also cited as authority by Judge Woodward in Jevons *vs.* Kline, supra. It is true that the Transit Company case was argued in October, 1895, and decided in January, 1896; nevertheless, it is apparent that the controversy in the court below was tried before the passage of the Act of 1895, and that the said act was not considered by the Supreme Court.

Other Common Pleas Courts have given full effect to the Act of Assembly. We refer to Lancaster *vs.* Flowers, 11 D. R., 495, where the act is upheld by Judge Arnold after a full discussion. We also find a Luzerne county case, Keller *vs.* Lamb, 10 Kulp, 246, in which Judge Halsey considers the effect of the Act of 1895 on prior legislation. The application of the act in a proper case is recognized by Judge von Moschzisker in Slifer *vs.* Slifer, 16 D. R., 239. And incidentally, yet without any intimation of doubt, the act is sustained by the Superior Court in the case of Dorrance *vs.* Ryan, 35 Sup. Ct. Rep., 180.

We are of the opinion that the Act of 1895 should be upheld and commended, because it furnishes effective and highly necessary remedial legislation for the adjustment of the rights of tenants in common in relation to the use and occupation of property held jointly. Controversies as to such rights have been fruitful of much litigation in the courts and it must be conceded that the remedies prior to 1895 were inadequate and frequently ended in a failure of justice.

In the case at bar the facts are very simple. The defendant had been in the exclusive possession of the whole of the joint property for several years, and frequent demands had been made upon her by the plaintiff for his proportionate share of the rent. The case is free from any of the complications which influenced the earlier decisions as to the effect of the Act of 1895.

The next exception relates to the plaintiff's claim of rent. The master has found that $150 per annum and the taxes was the fair rental value of the property. For a period of four years the plaintiff's share is $400. In fixing this period the master finds that the verdict in the ejectment case of Lee *vs.* Hamilton (involving the joint property) was rendered January 18, 1906. Belle Hamilton entered a judgment for $800 against Caroline Hamilton on December 29, 1909. This makes, practically, the period of four years. The master has allowed the plaintiff the $400, his share of the rent, regardless of the effect of the judgment. Quoting from the text books he holds that "the lien of a judgment is subject to all the equities which were held against the land in the hands of the judgment debtor at the time the judgment was rendered, and these will be protected by courts of equity as against the judgment lien, so that the latter may be confined to the interest remaining in the debtor after due recognition of the outstanding equities in their proper order." This doctrine is particularly applicable in the present case when the record notice of the verdict in the ejectment case is considered. We are of the opinion that the master's decision on this point was correct and we refer to his report for a further discussion of the question.

Another question brought up by the exceptions is as to the fee allowed the plaintiff's attorney in the partition proceedings. In the report of the master it is fixed at $250. The master had no power to allow any fee of any amount to the plaintiff's attorney. The compensation is for the plaintiff and must be taxed by the Court. The Act of April 27, 1864, P. L. 641, provides, "That the costs in cases of partition in the Common Pleas and Orphans' Courts of this commonwealth, with a reasonable allowance to the plaintiffs or petitioners for counsel fees, to be taxed by the Court or under its direction, shall be paid by the parties in proportion to their several interests."

This act has been construed by the Supreme Court in several cases. We shall refer to only one of them, it being a case in equity: Fidelity Ins. Co.'s Appeal, 108, Pa., 339, in which Mr. Justice Sterrett says:

"If there ever was any doubt as to the object and scope of this act, it should have been dispelled by what was said in Snyder's Appeal, 4 P. F. S., 67, and Grubb's Appeal, 1 Norris, 23. The mischief and the remedy are clearly pointed out in those cases. It frequently occurred, as it still does, that in consequence of minority, coverture and other causes, one of several tenants in common was compelled to resort to proceedings in partition for the purpose of effecting a division of the property held by them in common; and, no matter how small his interest therein might be, he was under the necessity of employing counsel to conduct the proceedings to a conclusion which was quite as beneficial to each of the others as to himself. The entire burden of paying for indispensable professional aid, in conducting the formal proceedings in partition for the common benefit of all, was thus cast on the one who instituted the proceedings. The act was intended to remedy this injustice by requiring that a reasonable compensation for the necessary professional services of counsel retained by the plaintiff or petitioner, as the case might be, should be determined by the Court and paid by all the tenants in common in proportion to their respective interests. The design of the act was to place the parties upon a relative equality as to the necessary expenses of effecting a partition of the common property; and it was evidently intended that those expenses should include not only the docket costs proper, fixed by Act of Assembly or by the Equity Fee Bill, but also a reasonable allowance for counsel fees, graduated according to the circumstances of each particular case, the nature and extent of the services necessarily rendered for the common benefit of all the parties in interest. In view of what has been said, it is scarcely necessary to add that the 'reasonable allowance' contemplated by the act does not include expenses of adversary proceedings, resulting from a defense to the plaintiff's demand for partition or from any other cause. Such an allowance would be clearly beyond the scope of the act. The main ground of reversal in Grubb's Appeal, supra, was that

the auditor allowed counsel fees to the plaintiffs for what he termed 'the litigation of the defendant.' "

In the case at bar there was no contest except before the master. The proceedings are not complicated. Only two parties were interested—the plaintiff and defendant. The partition involved only one piece of property. The plaintiff's bill for partition consists of six pages; there was an order that the bill be taken pro confesso; and there was a formal decree awarding partition and appointing a master. The real contest between the parties began before the master and nearly all the evidence on both sides relates to the rental value of the joint property, a farm. We have no doubt that plaintiff's counsel has earned $250, but he must look to his client for compensation. Nevertheless, the plaintiff is entitled to a reasonable allowance for counsel fee for the service rendered for the common benefit of the co-tenants. We therefore make an order allowing counsel fee of $100, to be taxed as a part of the costs in the case; and the exception is sustained to the extent above indicated.

All the other exceptions are overruled. We need not refer the report back to the master. Counsel will undoubtedly arrange matters amicably so as to leave the way open for final confirmation of the report.

IN RE ESTATE OF DANIEL S. GERMAN, DECD.

Will—Option to Purchase Land—Laches.

An option to purchase real estate, under the terms of a will, at a certain valuation, must be exercised within a reasonable time after the death of the testator, unless the intention of the testator is otherwise expressed in the will.

In the Orphans' Court of Lehigh County. Petition of certain heirs to have the Decree opened and set aside, adjudging real estate of decedent to Edwin F. German.

M. C. Henninger and E. K. Kline, for Edwin F. German.

George J. A. Miller, and Freyman, Thomas & Branch, for heirs.

Trexler, P. J., July 1, 1912. Daniel S. German, by will dated the 20th day of October, 1895, provided among other things, that his wife Amanda Rebecca should have the use of certain personal property, and various rights and privileges on the farm. These privileges were to be enjoyed during her natural life. The executor was also to pay her a sum of money semi-annually.

In the 8th clause he orders and directs that after his death his executor shall pay the sum of $100 to the Reformed and Lutheran congregation in Heidelberg Township, and in the 9th clause he directs his executor after his death to sell and convert into money all his remaining goods not reserved as theretofore stated.

In the 11th clause he provides "That at any time by consent of my widow by joining in the conveyance my executor in trust shall have the power and authority to sell at private or public sale all or any part of my real estate during the natural life of my wife, but the two hundred and fifty dollars annual bequest to my wife shall remain secured on my real estate."

In the 13th clause he directs that as soon as practical after the death of his wife his executor shall sell the rest, residue, reversion and remainder of his estate.

He appointed his nephew Edwin F. German executor.

On February 20, 1904, he executed a codicil to the will, and the third item of this codicil is the one that we are called upon to construe. It reads as follows:

"I order and direct, after my death, that my nephew, Edwin F. German, shall have the option to take all my real estate for the sum of Eight Thousand Dollars, if he so desires, subject however, to all conditions named in my foregoing will."

The widow, Amanda Rebecca German, died October 19, 1910. The executor did not accept the real estate during the life time of the widow. For a period of over five years he managed the farm. After the death of the widow, on the 3rd of April, 1911, he presented his petition under the Act of 5th of March, 1903, P. L. 10, asking the Court to adjudge the real estate to him at the valuation stated in the will, and without notice to other heirs and legatees in said estate an order was made in compliance with the petition. The question is now before the Court upon a petition to open said decree.

When was Edwin German, the executor, required to exercise the option to take the real estate of decedent at Eight Thousand Dollars? Did the privilege to do so continue until the death of the widow, or should it be exercised within a reasonable time after the death of the testator? I have come to the conclusion that taking the entire will and codicil and construing it from its four corners, the intention of the testator was that the option should be exercised in a reasonable time after his death.

The language employed "Subject, however, to all conditions named in my foregoing will" would indicate that the executor was to take the real estate subject to the rights and privileges vested in the widow. Whilst the phrase "After my death" may have no particular meaning ordinarily because all wills take effect after the testator's death, still the ninth clause of the will indicates that where the executor is directed to sell and convert into money after the testator's death all the remaining goods the testator used the words as indicating some act to be done within a reasonable time after his death.

The objection raised that the period of distribution of the estate in the 13th paragraph of the will is stated as following the death of his wife may be answered by reference to the 11th, where the sale of the real estate in whole or part during the life of the widow by her consent is authorized. In the 13th paragraph he provides that the executor shall sell after the death of his wife, and it is reasonable to infer that if he wished to have this option exercised after the death of the widow he would have inserted the same words. It may be noted that the care the testator evinces for the well being of his wife could have been conserved as well after the sale of the farm as during the time when the executor had it in charge, because the land is subject to the privileges accorded to the wife. I therefore conclude that the rule granted must be made absolute.

Now July 1, 1912, rule absolute.

IN RE ESTATE OF LOVINA METZGAR, DECEASED.

Wills—Register—Practice an Later Will Being Produced Than the One Probated.

The proper practice, where, after probate of a will, a later will is produced, is for the Orphans' Court to open the decree admitting to probate the earlier will, and direct that the latter will be produced before the Register of Wills to be admitted to probate upon due proof.

The Register of Wills has no power of his own accord to revoke his probate of the first will.

In the Orphans' Court of Lehigh County. In re Estate of Lovina Metzgar, deceased. Appeal from Decision of Register of Wills.

H. A Cyphers, for first will probated.
C. W. Kaeppel, for proponent of second will.

Trexler, P. J., July 6, 1912. A will of Lovina Metzgar, dated May 15, 1900, was admitted to probate by the Register of Wills February 28, 1912. On the 6th of March, 1912, a paper purporting to be the last will and testament of Lovina Metzgar dated November 24, 1908, was presented to the Register of Wills and probate refused.

The Register having admitted the first will, could not admit the second. He had no power to revoke his probate of the first will. With the probate of the first will his judicial powers ceased. Matthews *vs.* Diddell, 8 Pa. Sup. Ct. 112; Beatty's Est., 193 Pa. 304; McAndrew's Estate, 206 Pa. 366; Miller *vs.* Henderson, 212 Pa. 263.

Of course if both wills were the sound testamentary act of the testatrix, the latter must be admitted to probate The testimony before the Court taken by the examiner, as is the custom, (see Rule of Court C. P. VI, Section 3) makes out a prima facie case for the second will as will appear by the testimony of the subscribing witnesses. It bears a later date and is clearly testamentary.

We are not however in a position to decide between the two wills. The proper course as laid down in Cawley's Estate, 162 Pa. 520, and in the late case of Crawford *vs.* Schooley, 217 Pa. 429 (434) is for the Orphans' Court to open the decree admitting to probate the earlier will and direct that the appellants produce before the Regis-

ter the paper which they claimed to be a later will and proceed to make proof of its execution and validity in the usual manner.

Now July 6, 1912, the decree admitting to probate the paper purporting to be the last will and testament of Lovina Metzgar, deceased, dated 15th of May, 1900, is opened and the contestants are directed to produce a certain paper dated November 24, 1908, which they allege is the last will and testament of said Lovina Metzgar before the Register of Wills, and make proof of its execution and validity to the end that it may be admitted to probate as the last will and testament of Lovina Metzgar if the Register so decides.

GOTTSCHALL *vs.* KAPP ET AL.

Bond on Appeal—Amount Less Than Required by Law—Credit for Costs.

The sureties are liable on bond of defendant given on appeal to Superior Court to the full amount of the bond, even though that is less than the amount required by law; and they are not entitled to any credit for the amount of the costs paid by defendant, these not having been paid by the sureties on account of their liability.

In the Court of Common Pleas of Lehigh County. A. H. Gottschall *vs.* Samuel S. Kapp, William G. Walp and A. A. Hertzog. No. 59 April Term, 1912. Assumpsit on Bond given on Appeal.

W. L. Gillette and M. C. Henninger, for Plaintiff.
Frank Jacobs and Edward Harvey, for Kapp.
H. A. Cyphers, for Walp.
R. J. Butz, for Hertzog.

Trexler, P. J., June 22, 1910. Judgment was entered in favor of the plaintiff against Samuel S. Kapp February 18, 1910, for $1050. On March 10, 1910, defendant appealed to the Superior Court and on April 10, 1910, entered a bond in appeal with William G. Walp and A. A. Hertzog sureties for $500. The condition of the bond is as follows: "Upon this condition, that if the said appellant shall prosecute the appeal with effect and abide the order or decree of the appellate court, and pay all costs

and damages awarded by the appellate court or legally chargeable against said appellant and pay all damages for injuries suffered by appellee from the time of the decree entered and all mesne profits accruing after judgment, then the above obligation to be void or else to remain in full force and virtue."

The judgment having been affirmed (47 Pa. Sup. Ct. 102) suit was brought on the bond. Affidavits of defense were filed, in which the defense is set up that the bond was given for the payment of costs only and the costs having been paid, the condition of the bond was satisfied. The matter is before me on a rule for judgment for want of a sufficient affiidavit of defense.

The bond was not given in compliance with the act of assembly regulating the practise on appeals approved May 19, 1897, P. L. 67. It was not given in double the amount of the judgment (Sect. 6), but in other respects the bond was in substantial compliance with the act.

Why the bond was given in less than half the amount of the judgment, or whether the amount was fixed by the parties, or by the Prothonotary or clerk as required by Section 5 of the above act we need not inquire.

We are only concerned about the written obligation in which the defendants entered. This presents no difficulty. The language is plain. They are to pay all costs and damages awarded by the appellate court, the liability of the sureties being of course limited to the amount of the bond. If there was any wrong done in entering the bond for a lesser amount than required by law, the plaintiff should not suffer, nor should the defendants be allowed to profit by their own mistake.

This position is abundantly supported by a number of authorities, and I will only refer to the following: Clement *vs.* Courtright, 9 Pa. Sup. Ct., 45. Com. *vs.* Clifsham, 16 Sup. Ct. 50. Bowditch *vs.* Gourley, 24 Sup. Ct. 342. Com. *vs.* Harvey, 51 P. L. J. 380.

Counsel for the sureties have requested that should my decision be adverse to them, they should be allowed credit for the amount of the costs, $150.70, which appears by the record to have been paid. The only credit that could be allowed would be such sum or sums as were paid by the sureties on account of their liability on the bond, and in relief of their obligation. The defendant

Kapp owed the full amount of the debt and costs, and the payment of the costs by him relieved the sureties of the obligation to pay them, but they are still liable for the damages awarded to the extent of the amount of the bond.

Now June 22nd, 1912, judgment is entered against the defendants for the sum of five hundred dollars.

KOMARONY *vs.* WINGER.

Justice of the Peace—Jurisdiction—Trover and Conversion.

A justice of the peace has no jurisdiction in a suit for damages suffered by plaintiff through the refusal of defendant to permit the former to remove growing crops.

Trover and conversion does not lie for growing crops.

In the Court of Common Pleas of Lehigh County. Eugene Komarony *vs.* Joseph Winger. No. 73 January Term, 1911. Appeal from Judgment of Justice.

Milton C. Henninger, for Plaintiff.
George R. Booth, for Defendant.

Trexler, P. J., July 6, 1912. The suit was an action of trover and conversion. Before the justice the plaintiff claimed damages for cabbages, four acres of corn, clover hay, rutabagas, potatoes and cauliflower. The plaintiff was tenant on the farm and during his tenancy, the title changed and the defendant became the owner. The plaintiff claims that after he had left the farm, the defendant refused to allow him to enter and take away the above articles which were still on the ground. At the trial I directed a verdict for defendant. Assuming that the action was properly entitled before the justice as trover and conversion, it would not lie for the growing crops. If we look to the merits of the case and disregard the title of the case so far as the same appears on the justice's transcript, we find that the proper action would be trespass on the case. Of this action, the justice has no jurisdiction. In either view of the case the plaintiff cannot recover in the present action.

Now, July 6, 1912, motion for a new trial is overruled.

JONES *vs.* COUNTY OF LEHIGH.

Criminal Law—Fees—Justice of Peace.

A justice is entitled to fees in only one case, where separate prosecutions by one prosecutor are brought against same defendants on charges of felonious entry.

It seems that separate felonies of the same general nature may be charged in separate counts of the same indictment in case they are triable in the same manner and punishable similarly.

In the Court of Common Pleas of Lehigh County. Walter L. Jones *vs.* County of Lehigh. No. 52 June Term, 1912. Case Stated.

Lawrence H. Rupp, for Plaintiff.
Max S. Erdman, for Defendant.

Trexler, P. J., July 1, 1912. The agreement filed in the case shows that there were nine prosecutions brought before Walter L. Jones, Alderman. The prosecutor was the same, the cases were heard at the same time. Separate fees were charged in each case. The county paid them in but one case, and the question before me is, is the justice of the peace entitled to fees in each case?

The Act of March 10, 1905, P. L. 35, Section 2 provides "It shall be unlawful, in all criminal prosecutions hereafter instituted, to tax costs in and on more than one return, information, complaint, indictment, warrant, subpoena or other writ, against the same defendant or defendants, where there has been a severance or duplication of two or more offenses which grew out of the same occurrence, or which might legally have been included in one complaint and in one indictment by the use of different counts."

The question therefore to be decided is, could these nine cases be legally included in one complaint and in one indictment by the use of different counts? It was argued that the conjunctive "and" being used the question would resolve itself down to this—whether these various charges could have been laid in one indictment. Whilst ordinarily the construction asked for would prevail it is a question whether in this case the word "and" should not be read as "or" for the reason that the latter part of the sentence contains the words "By the use of different counts." The word "count" is not usually

applied to a complaint, but is peculiarly connected with the use of the word indictment. If the word "and" is to be understood in its usual significance the sentence could be read "which might legally have been included in one complaint by the use of different counts and in one indictment by the use of different counts." It is a question whether that is the sense of the sentence. There is no doubt that these different charges could have been included in one complaint, or at most in two, the complaint having been made by one prosecutor against the same defendants, although not all the defendants are included in all the charges. Passing on however to the question whether these charges when against the same defendants could have been laid in one indictment, it appears that the decisions are not uniform on the subject.

The earliest case in Pennsylvania is found in Com. *vs.* Gillespie, 7 S. & R., 469, and the statement of the rule is not as clear as it might be. "Even in case of felony, though it be true that no more than one offence should regularly be charged, in one indictment, and that the Court would quash the indictment before plea, or, if on the trial, the Court should think it might confound the prisoner, they may exercise a discretion in compelling the prosecutor to elect on which charge he will proceed, yet even in felonies, there is no objection to the insertion of several distinct offences of the same degree, though committed at different times, in the same indictment against the same offender."

In Harmon *vs.* Com., 12 S. & R., 69, it is said that there is "A general rule that though two felonies may be joined in an indictment, yet it is improper to join a felony and a mere misdemeanor.

In Com. *vs.* Shoen, 25 Sup. 211, the principle is recognized that "A defendant can not be indicted in one bill for several distinct and unrelated felonies."

The earlier cases make a distinction between felonies and misdemeanors. Com. *vs.* Gouger, 21 Pa. Sup. 217. Com. *vs.* Dobbins, 2 Parsons 380. The joinder of distinct offenses in the same indictment when not repugnant in their nature and incidents is permitted. 3 Sup. Ct. 588 (596) Com. *vs.* Rockafellow. Com. *vs.* Shaffer, 45 Pa. Sup. Ct. 595.

As to the rule that a felony and a misdemeanor could

not be joined in one indictment, that was departed from in Harman *vs.* Com., 12 S. & R. 69. It has been decided as to misdemeanors that any number of like misdemeanors can be joined in one indictment. Com. *vs.* Adams, 2 Pa. Superior Ct. 46. There appears to be no reason why a distinction should be preserved in this regard between felonies and misdemeanors. "Indeed the statutory classification of crime as felony or misdemeanor is governed by no fixed or definite principle, but is purely arbitrary." 6 Sup., 405 (409) Com. *vs.* Hutchinson.

The rule seems to be that "subject in most instances to the discretion of the trial court to compel an election, separate felonies of the same general nature may be charged in separate counts of the same indictment in case they are triable in the same manner and punishable similarly." 22 Cyc. 398.

I therefore conclude that the claim of the justice for costs in each case can not be maintained. According to the case stated in each of the cases the charge was felonious entry. Nos. 84, 85, 86 and 87 Sept. Sessions, 1911, are against William Hecker, Jr., and Ellen Hecker, and the costs having been paid by the county in No. 84 there is nothing due the justice on these cases. Nos. 88, 89, 90, 91 and 92 September Sessions, 1911, are against William Hecker, William Hecker, Jr., and Ellen Hecker. These could have been included in one case. The justice is, therefore, entitled to charge costs in but one case.

Now, July 1, 1912, judgment is, therefore, entered for the sum of ten dollars and fifty cents ($10.50) in favor of the plaintiff.

SHORT & CO. *vs.* DELAWARE AND HUDSON CO.

Railroad Company—Common Carrier—Wrongful Detention of Goods by Carrier—Credit Contract with Consignee—Estoppel.

As between a common carrier and a consignee of freight who owns the goods, the carrier's lien for freighting may be extended by specific agreement so as to subject the goods to a lien for arrearages on previous shipments.

But, being in derogation of the common law, such lien is regarded with jealousy and must be supported by strict proof of the contract.

Hence, if the term of credit as defined by the contract is neither

certain nor capable of being reduced to certainty, the Court cannot say when a breach is incurred; and that is a fatal objection to such extended lien.

But, though the contract be free from objection, the carrier will be estopped from asserting such lien where without notice of his intention to claim it he collects the specific charges on a given shipment, takes from the consignee the usual delivery receipt, and then refuses to make actual delivery.

Replevin. In the Court of Common Pleas of Lackawanna County. No. 1609 September Term, 1909.

Price & Price, for Plaintiff.
Welles & Torrey, for Defendant.

Newcomb, J., August 12, 1912—This is an issue in an action of replevin which was by agreement of parties submitted to the Court for decision without a jury as provided by Act of 27th April, 1874, P. L. 109. In effect it is presented as upon demurrer to the affidavit of defense, as it was tried wholly upon the pleadings without other evidence. The chattels involved are several shipments of merchandise carried by defendant for delivery to the plaintiffs in this city, where they were retained for non-payment of freight charges owing by plaintiffs on account of other and previous shipments. The question at stake is whether it was so done in the valid exercise of defendant's rights under the terms of a credit agreement between the parties. On their face the undisputed facts are simple and may be stated as follows:

CONCLUSIONS OF FACT.

1. Defendant company is a common carrier of freight and passengers by railroad having a division terminal in this city where plaintiffs are wholesale provision merchants.

2. In 1908 plaintiffs asked defendant, through its freight agent, for a line of credit on their freight account which was allowed apparently by the carrier's informal acceptance of a proposal in writing as follows:

"Scranton, Pa., March 11, 1908.

"E. E. Paine,
"D. & H. R. R. Station.

"Dear Sir: I would respectfully apply for credit at your station. Said credit not to exceed the sum of five

thousand dollars. At present we are receiving credit at the following Delaware and Hudson Company's stations:

"Scranton, Pa.

"In case of non-payment of freight charges as outlined above, the Delaware and Hudson Company is hereby authorized to retain freight consigned to us to a sufficient value to cover any indebtedness.

"Yours truly,

"JOHN H. SHORT & CO."

3. Outside of this writing there is nothing to show what was referred to by the term "as outlined above." Plaintiffs claim it avoids the contract for uncertainty; by defendant it is said to be more surplusage.

4. The shipments in suit arrived at the switch in this city August 23d and 24th, 1909, consigned to plaintiffs, and the freight was charged to their account for that month. The goods consisted of a carload of flour, two hundred packages of pork and beans, and twenty-five tubs of butter. Upon notice of their arrival they paid the charges and gave the usual form of receipt required by defendant to show a delivery of the goods. But thereupon actual delivery was refused because of arrearages owing by plaintiffs on their account for June and July amounting to $1,979.89. Itemized bills of the account had been presented at the end of each month. When they fell due does not appear. Neither does it appear for what specific reason they had not been paid; nor that this state of the account was exceptional as compared with the term of credit theretofore allowed during the life of the contract. It is only shown in general and somewhat ambiguous terms that payment had been "neglected and refused."

5. Defendant's action in the premises was in assertion of its claim of right according to the terms of the request for credit. Its intention to detain the shipments, however, was not disclosed until after the charges thereon had been collected and it had plaintiffs' receipt for the goods. Its reason for thus giving to the transaction color of delivery appears only in the argument of its counsel as frankly set forth in his brief. It is this: From the standpoint of the consignor the right of stoppage was recognized as available at any time before the title was fully passed to the plaintiffs; and if return should be

demanded while the goods were still in its possession as carrier they could not be held for the charges now in question. Hence, the constructive delivery was an expedient on its part to conclude the consignor.

6. The detention brought on this suit and, the property having been delivered to plaintiffs by the sheriff, the parties have stipulated for judgment as follows:

If for plaintiffs, a general judgment with nominal damages only; otherwise judgment for defendant in the sum of $1,859.28, with damages for detention in the discretion of the Court sec. leg.

Certain requests for findings of fact have been submitted by plaintiffs, but they are fully covered by the foregoing and need not be further answered.

The facts found are believed to support the following

CONCLUSIONS OF LAW.

1. The nature of the lien asserted by defendant casts upon it the burden of strict proof. It depends wholly upon the contract of the parties. As to the terms thereof there is no evidence save the writing of March 11, 1908, requesting credit.

2. As to the time when or conditions under which plaintiffs would thus be in default so as to put in effect the right of detention, the instrument is so indefinite that it is neither certain nor capable of being reduced to certainty. Thus the proof fails in a vital particular and that alone is decisive against the defendant.

3. Moreover, the claim of lien is repugnant to the terms of the receipt taken for the ostensible delivery of the goods. It is against the policy of the law to suffer defendant to impeach its own act in that way. Having exacted from plaintiffs a receipt for the merchandise which imports a transfer of possession, it is estopped from asserting the contrary for the purpose of maintaining a lien which on the face of the receipt was discharged.

4. Thus in either point of view the detention was wrongful and the issue is with the plaintiffs.

5. Judgment is accordingly directed to be entered generally against defendant and in favor of plaintiffs for the goods and chattels mentioned in the writ, with nominal damages in the sum of six cents, together with costs,

at the end of thirty days from this date unless exception be filed in the meantime sec. leg.

Defendant's requests for conclusions of law are disposed of as follows:

1. The following application and agreement.

"Scranton, Pa., March 11, 1908.

"E. E. Payne, Agent,

"D. & H. R. R. Station.

"Dear Sir: I would respectfully apply for credit at your station, said credit not to exceed the sum of five thousand dollars. At present we are receiving credit at the following Delaware and Hudson Company's stations:

"Scranton, Pa.

"In case of non-payment of freight charges as outlined above, the Delaware and Hudson Company is hereby authorized to retain freight consigned to us to a sufficient value to cover any indebtedness.

"Yours truly,

(Signed) JOHN H. SHORT & CO."

is a valid agreement and gave the defendant a legal right to withhold freight consigned to John H. Short & Company until the freight due, amounting to nineteen hundred seventy-nine dollars and eighty-nine cents ($1,979.-89) was paid.

Answer. Refused.

2. The plaintiffs, John H. Short & Company, did not have the right of possession of the goods consigned to them until the back freight charges aforesaid were paid.

Answer. Refused.

3. The defendant is entitled to judgment in the sum of nineteen hundred seventy-nine dollars and eighty-nine cents ($1,979.89), with interest from September 3, 1909, with the right to proceed directly against the surety on the replevin bond filed in this case.

Answer. Refused.

OPINION.

There is no apparent reason why the extension of a carrier's lien is not a legitimate subject of contract as between him and a consignee who owns the goods: R. R. Co. *vs.* Oil Works, 126 Pa., 485. Therefore the trouble with defendant's case is not inherent in the nature of the

credit agreement; but in its terms. On its face their writing bears the suggestion that something in the mind of the parties was omitted. That inference seems to attach to the words: "as outlined above." But there has been no attempt to supply any supposed omission, and thus the writing must stand as the sole evidence of the contract. The obvious question then is: What was the term of credit? When did the account fall due; when did the event of "non-payment as outlined above" occur, so as to subject these goods to the lien for arrearages? The only thing in the nature of a limitation is the maximum of credit asked for. But if tested by that feature the detention was manifestly premature. If the term of credit was a mere matter to be determined by defendant at pleasure, then the plaintiffs took nothing by the contract and it was bad for want of mutuality.

While a general lien for the benefit of the carrier may be created by private agreement with a shipper or consignee, it is regarded with jealousy as in derogation of the common law: Hutchinson on Carriers, 540; Rushforth *vs.* Hadfield, 7 East. 224; McFarland *vs.* Wheeler, 26 Wend. 467. Hence, a lien for a general balance due to the carrier by the owner of the goods can only be supported by special contract. Such contracts are to be strictly construed and the lien cannot be claimed unless clearly within the terms of the stipulation: Moore on Carriers, 431.

It cannot be said that this is the case with the lien alleged here. The contract is so indefinite in respect to the term of credit that it is impossible for the Court to say whether it has been performed or not. Out of a contract so uncertain in a material particular no obligation can arise which is enforceable at law: Purves' Est., 196 Pa., 438; Butler *vs.* Kemmerer, 218 Ib., 242.

Essentially the undertaking here is, in point of uncertainty, not to be distinguished from a promise to take a note for a certain sum, without specifying the terms: Van Schaick *vs.* Van Buren, 70 Hun., 575; nor from a provision in a lease whereby the tenant was given an option to buy the property within two years, but without mentioning the price: Smoyer *vs.* Roth, 13 Atl., 191; nor from a contract to sell land which provided for delivery of the deed upon receipt of the cash payments and "the securi-

ties for the deferred payments" without specifying the kind or character of the securities: George, et al. *vs.* Conhaim, 37 N. W. R., 791,—all of which were held void for uncertainty. So in a suit by a son to compel his parents to convey land founded on a promise in consideration of his remaining at home, managing the farm, furnishing the money to support and educate his younger brother, and assist him in getting started in business, it was said by Chief Justice Cooley: "Whether parties making such a contract would contemplate a cost of $1,000 or $20,000, no one but themselves could say; for the one sum might in some cases be made to answer, or the other be required. Courts cannot enforce such contracts; they must rest for performance upon the honor and good faith of the parties making them;" Bumpus *vs.* Bumpus, 53, Mich., 346.

In the present case it would be equally impossible for the Court to say whether the term of credit contemplated was one day, one month, three months or any other period. "The parties may have come to a real agreement but they must take the chances of not having made it intelligible:" Pollock on Contracts, 42.

So much for this feature which is decisive of the controversy; but the effect of the delivery receipt taken from the consignees is believed to be worthy of notice. The circumstances savor somewhat of finnesse going to the verge of deceit and bad faith. That the specific charges were collected and the receipt taken with a mental reservation is not denied; but on the contrary candidly avowed. That the carrier should thus be able to bind the consignee against his consent to a fictitious delivery on the one hand, while on the contrary retaining the benefit of actual possession, is a proposition at war with the elementary principles of law. If delivery had taken place as the voucher said it did, all liens would have been at an end. To avoid that result, the carrier must contradict the writing, and that not for fraud, accident or mistake, or for any other reason going to the integrity of the transaction; but merely to defeat its prima facie effect for its own collateral advantage. This, in my judgment, it cannot be permitted to do. As between the parties to such a writing it is only the injured party who can be heard to impeach it. For a valuable and executed consideration moving from plaintiffs, the defendant distinct-

ly committed itself on paper to the fact of transfer of possession. In law and equity it must be taken at its word. It is believed to be estopped from asserting the contrary, and thus it is in no better position to claim a lien than if the delivery had been actual.

Let judgment be entered for plaintiffs in form above stated.

KATE E. LITZENBERG, ET AL. *vs.* GEORGE A. BUCKLEY, ET AL.

Defendants were the owners of certain lots in a plan of lots, containing a building restriction, that dwelling houses that might be erected on said lots should be built so that the front lines thereof should be exactly sixty-five feet from the side of the street. They constructed dwellings sixty-five feet back from the side of the street and proposed to erect houses on the rear of their lots fronting on other streets. Held, in a bill to restrain defendants from so doing, no restrictions of any kind having been imposed on the back part of the lots as to the erection of buildings, that defendants did not violate the building restrictions.

All doubts must be resolved in favor of the natural rights and free use of property and against restrictions.

In the Court of Common Pleas of Montgomery County. No. 8, March Term, 1912. Sitting in Equity. Hearing on Demurrer to Plaintiff's Bill.

Muscoe M. Gibson, Esq., for Plaintiffs.
Evans & Dettera, Esqs., for Defendants.

Opinion by Swartz, P. J. The bill was filed to restrain the defendants from erecting dwellings or residences on the back parts of their lots. The plaintiffs contend that a building restriction, to which the defendants' lots are subjected, will be violated by the erection of the proposed dwellings.

That the restriction, recited in the third paragraph of plaintiffs' bill is applicable to the defendants' lots, is admitted. That the plaintiffs have standing to test the defendants' right to erect the proposed buildings is not disputed.

The heirs of Horatio G. Litzenberg laid out a tract of ground in seventy-one building lots. A draft was sub-

mitted by the parties and it was agreed, at bar, that it should be treated as part of the bill or as an exhibit to the bill. It is marked draft "A."

The lots are in three tiers. Mr. Buckley's lot is No. 28 and is located at the corner of Greenfield and Spring Avenues. It has a frontage of about 110 feet on Greenfield Avenue and a depth of at least 275 feet along Spring Avenue. Mr. Dyson owns lots Nos. 26 and 27. The combined lots have a frontage, on Ardmore Avenue, of about 135 feet and a depth of about 275 feet along Spring Avenue.

As we understand the allegations in the bill, Mr. Buckley constructed a dwelling or dwellings, fronting on Greenfield Avenue, sixty-five feet back from the Southeast side of said Avenue. The curtilage of the dwellings runs back 150 feet from the avenue. The balance of his lot, 125 feet, along Spring Avenue, he divided into two lots and proposes to erect on this rear ground two houses fronting on Spring Avenue.

In like manner Mr. Dyson improved his lots with a dwelling or dwellings, fronting on Ardmore Avenue and distant from the side of said avenue, sixty-five feet. He also proposes to build two houses on the rear of his lots, but 150 feet distant from the side of Ardmore Avenue. These proposed houses will also front on Spring Avenue.

Will these houses, on the rear of the lots, 150 feet from the avenue, violate the building restriction? The covenant, as to the lots fronting on Greenfield Avenue, reads as follows:—"That any dwelling houses that may be erected on said lots shall be built so that the front lines thereof shall be exactly sixty-five feet from the southeast side of the said Greenfield Avenue, and no dwelling houses erected or to be hereafter erected upon said land shall be of less value than three thousand dollars each, the space in front of said dwelling houses and the southeast side line of said Greenfield Avenue shall be and forever remain an open space, unobstructed by any building or buildings, of any kind, except by piazza, conservatory, steps, fences, trees or shrubbery, and further that no carriage house, stable, hen-house or pen of any kind shall be placed upon said lots, nearer to the southeast side of said Greenfield Avenue than one hundred and fifty feet, and that no owner or occupier of

said lots, or any part thereof, or any other person or persons shall engage in or carry on, in any way, upon the same, or any part thereof, the occupation or trade of butcher, soap-boiler, tallow-chandler, dyer, brewer, distiller, nor any nauseous or offensive business, of any kind whatever, at any time now or hereafter forever."

There are further provisions for the removal of any structures erected in violation of the foregoing restrictions.

In the bill it is contended that only one dwelling house can be erected upon each lot. In the argument of counsel for the plaintiffs it is conceded that an owner may erect as many houses as his front will accommodate, provided he builds them exactly sixty-five feet from the side of the avenue.

We find nothing in the restriction or covenant that confines an owner to the erection of a single house on his lot. The dwelling house must have a value of $3000. It must not be located within sixty-five feet of the street line, and this front space must not be obstructed by any building. No carriage house, stable, hen-house or pen of any kind, shall be placed within 150 feet of the avenue. No butcher can carry on his occupation upon his lot and certain other specified trades are prohibited by any occupant. These are the only covenants that are given in express terms. Covenants of this nature, which restrain a man in the free enjoyment of his property, are not to be extended by implication. St. Andrew's Church's Appeal, 67 Pa. 512. Before a defendant can be restrained, there must be a plain disregard, on his part, of the express terms of his covenant. All doubts must be resolved in favor of a free and unrestricted use of the property. Nothing will be regarded as a violation of the restriction, that is not in plain disregard of its express words. Crofton *vs.* Church, 208 Pa. 209.

No restriction of any kind is imposed on the back part of the lot, 150 feet from the avenue, except the trades and occupations specified cannot be carried on by an owner or occupier on any part of the lot. Where is there a word or term in the covenant that can be treated as an express prohibition against any building, back of the 150 feet line from the avenue, except buildings to be used for the interdicted occupations? The fact that buildings for

certain forbidden purposes can not be erected implies that others, not falling within the class, may be constructed. If it was intended to exclude buildings from the lot, 150 feet back of the street line, or to forbid the construction of an additional dwelling upon such rear part of the lot, it would have been an easy and simple matter to say so.

But it is argued that such intent is clearly expressed in the provision "that any dwelling houses that may be erected on said lots shall be built so that the front lines thereof shall be exactly sixty-five feet from the southeast side of Greenfield Avenue." It is evident that the sole purpose of this requirement was to establish a fixed building line, for all the houses fronting on Greenfield and Ardmore Avenues and to maintain an open space next to the street for beauty and ornament. An irregular building line, where houses are erected in tiers, close to each other, is always an objectionable feature. This intent is emphasized when we consider the provision that no unsightly buildings can be placed within 150 feet of the avenue. The attractive front yards must not be marred by objectionable back buildings. In construing these covenants, effect is to be given to the intention of the parties, as shown by the language of the instrument, considered in connection with the circumstances surrounding the transaction, and the object had in view by the parties. 11 Cyc., page 1077. We can give full effect to the intent and purpose in fixing the building line restriction without infringing upon the right of a lot owner to improve the rear of his ground. This we must do, because all doubts must be resolved in favor of the natural rights and free use of property and against restrictions.

But it is said "the true intent and meaning of the restrictions is that the said tract of land, so divided, into lots, shall remain suburban in character." We fail to find any such purpose expressed in the covenants. On the contrary a tract of ground laid out into lots, so that more than one hundred and fifty houses may occupy the plot of twenty acres or more when the enterprise is fully consumated, lacks the character of suburban settlements. The plot in evidence describes the ground as "laid out in building lots," and deed contains the same declaration.

A case, very similar to the one now under considera-

tion, is found in Roberts *vs.* Porter, 37 S. W. Rep. 485 (100 Kentucky, 130). The provision in the conveyance required "that the lot when improved should have on it a brick residence, not less than two and a half stories high, and that said residence shall front Ormsby Avenue, and that the front line of same shall not be nearer Ormsby Avenue than the front line of the Morat Homestead, now in the same block." The owner erected the dwelling, as demanded in the covenant. He then proceeded, as in the case before us, to erect three houses on the rear of his lot, fronting on a side street. In refusing an injunction the court said: "The chief question here, however, is, what is the extent and meaning of the condition? Confessedly the lot has on it a brick residence, not less than two and one-half stories high, fronting on Ormsby Avenue, and the front line of which is not nearer that avenue than the front line of the Morat Homestead; and it seems to us that if further prohibitive stipulations were intended, they would have been inserted. The frontage of the residences, on Ormsby Avenue, their size and quality, and the distance the houses were to stand from the avenue, were the chief points of interest. We do not believe that the improvement of the rear of the lots was in the mind of the grantors at all, but only the Ormsby Avenue end."

What was here said applies with equal force to the 125 feet rear of the lot frontage on Spring Avenue. In our case we have the further consideration that in forbidding specified trades and occupations on the lot, including the rear, there is the natural implication that all other uses and buildings necessary to accommodate them are allowed.

And now June 18th, 1912, the demurrer is sustained and the bill is dismissed at the costs of the plaintiffs.

A. L. ETTER *vs.* ST. PAUL FIRE AND MARINE INSURANCE COMPANY.

Insurance—Parol Contract for Renewal,

A valid contract of insurance may be made by parol; but such contracts must be clearly established in every particular.

Before an insurance company can be bound by a renewal of an

insurance contract, or by an agreement that it shall be renewed or continued in force for another term than that mentioned in the original policy, full and specific authority should be shown to have been given to the agent of the company for the making of such an arrangement.

In the Court of Common Pleas of Dauphin County, No. 665, September Term, 1910. Motion to take off nonsuit.

John C. Nissley and Fox & Geyer, for Plaintiff.
Wm. M. Hargest and Thos. O. Peine, for Defendant.

McCarrell, J., February 21, 1912. The plaintiff claims under an alleged parol contract made with the agent of the defendant company re-insuring his personal property in the amount of $750.00 for five years from March 25, 1910.

On December 21, 1904, the plaintiff obtained through defendant's agent its policy of insurance, insuring his personal property in the sum of $500.00 for the term of five years. On March 23, 1905, the plaintiff desiring a larger amount of insurance upon the same personal property, applied to defendant's agent and obtained its policy of insurance No. 10095, insuring the said property in the sum of $750.00 for the term of five years.

Plaintiff testified that at the time he took out policy No. 10095 on March 25, 1905, he said to defendant's agent, Mr. Yetter,—"I preferred to have it in the St. Paul Company, and asked him whether he could place a second policy in the company, and he said, certainly he could. We met in front of the house, walked into the house through the yard and Mr. Yetter was perfectly satisfied apparently with the amount of furniture I had, and I asked him the rate. He quoted me a rate for three years and a rate of five years, which was $22.50, and I told him to write a policy for five years for $750.00. He brought me the policy a couple of days later to my office and I paid him and said to him at the time, now Mr. Yetter will you renew this policy when it falls due and keep the insurance alive? He said that he would."

He further testified that in December, 1909, when he renewed the first policy for $500.00, that he spoke to Mr. Yetter, the agent, in regard to the renewal of the $750.00 policy, and that Yetter said,—"He would renew this

policy. I was very anxious to have him renew this insurance in the same company, because I had a special reason for that. I had two policies in that company, the first for $500.00, taken out in 1904, which expired in 1909. When he brought the renewal for five years of the $500.00 policy, he brought it a few days I think before the time was up."

Plaintiff also stated that he had the same arrangement with the agent in regard to the renewal of the $500.00 policy which he had with respect to the renewal of the policy for $750.00, and he testified as to what occurred when the renewal of the $500.00 policy was delivered to him, as follows, to wit:—"Yes, I knew the $750.00 policy would be due some time the following summer, and I called his attention to it and asked him whether he would renew it, and he said that he would. I was not sure just what month it was due. My recollection was that it fell due in May, but of course after the fire I discovered it was March; but I seldom referred to my policies. I didn't know when it fell due, but I knew it was the following year."

The plaintiff also testified that after the fire of April 9, 1910, he had a conversation with Mr. Yetter, the agent of the defendant, as follows, to wit:—"After the fire when I discovered that my policy had run out on March 25th, I went to Mr. Yetter's office. This was Wednesday after the 9th. I met Mr. Yetter on the street, I asked him about the policy and said, I suppose you have renewed it. I thought he had renewed it and had it at his office and failed to deliver it. He said, No, I didn't renew it; I was sick during the month of March and was not able to attend to business and looking over my expiration book, I think he called it, I simply overlooked it. I said, Don't you remember that you agreed when this policy was written that you would renew it and keep me insured, and he said, Yes, I know that I did, but I was sick and I simply overlooked it. He expressed regrets. He walked to his office and of course talked a little bit further about the matter and I went home."

The plaintiff also testified that after the fire he had a conversation with Mr. Yetter, the agent of the defendant company, in the presence of Mr. H. B. Fox, whom he called in for the purpose of hearing what Mr. Yetter had

to say. The conversation was as follows:—"I said, Mr. Yetter, referring to that insurance policy which is in dispute, you know that you promised to renew the policy and keep me insured. He admitted that he did; and then I said to him, suppose this fire had not occurred and you had discovered fifteen days after the fire that the renewal had been overlooked, would you have renewed the policy and brought it down? He said, certainly I would, and I said, would you have said anything about overlooking the renewal for fifteen days? He said, no, I wouldn't. I said, suppose I had discovered it and called your attention to it, what would you have said? He said, I would have explained to you how it happened. * * * I said in case you had renewed this policy and brought it down, wouldn't you have dated it on March 25th? Oh, he said, certainly I would."

A motion for a compulsory non suit having been made at the conclusion of plaintiff's testimony, we held that no evidence had been submitted from which the jury would be warranted in finding that a lawful parol contract of insurance was effected between the plaintiff and defendant company, and accordingly sustained the motion for a compulsory non suit, giving the plaintiff fifteen days within which to make a motion and file reasons for taking off the same. The question now to be determined is whether or not the testimony submitted was sufficient to establish a parol contract of insurance covering the personal property of the plaintiff, which was destroyed by fire on April 9, 1910.

There are numerous cases in Pennsylvania, which hold that valid insurance contracts may be made by parol, but in all cases it is stated that such contracts must be clearly established in every particular.

The whole subject has been carefully considered by our Supreme Court in the case of Benner *vs.* Fire Association of Philadelphia, 229 Pa. 75-88. The facts in that case were very similar to those existing in the present case. In that case Benner testified that he met Hoch, the agent of the defendant company in August, 1905, and that Hoch then said to him,—"The policy on your house will expire shortly." A few days after this the plaintiff met Hoch and said, "renew the policy, and we will leave it the same as it is, but I have not the money to pay you

to-day, but I will pay you inside of a week or so," to which Hoch replied, "that would be all right." The plaintiff testified further, "and I said, don't forget the barn, and renew the barn as quick as that comes due and send it up, or send it up and I will pay you the same as I did previous to this time with the cash. I told him he should renew the policy on the barn and watch it up, and I would attend to it. I told him, if I can't pay you at once I will pay you like this time, and he said, "that will be all right and I will attend to it, you don't need to worry." The plaintiff further stated that subsequently he said to Hoch in reference to the insurance, "watch the others," and Hoch replied, "I will attend to them, you don't need to worry," and I told him again in front of my wife, you watch all the insurance."

The plaintiff contended that in this way he had established a parol contract, whereby the company agreed upon the expiration of the then existing policy to insure the barn by a renewal thereof. The court below gave binding instructions in favor of the defendant, and in considering the case on appeal, Mr. Justice Moschzisker, at pages 83-84, uses the following language:

"Oral contracts of insurance are not usual, and if for any reason one should desire to make such a contract he ought to do so in a proper manner, so that in any future controversy on the subject it can be made plain to the tribunal which has to pass upon it. Otherwise, wherever a careless man becomes in the habit of depending upon the insurance agent to notify him of the expiration of his policy, and the insurance runs out, he will be too apt to assume the right to set up such a contract.

"We do not overlook the cases that hold to the rule that where an oral preliminary contract of insurance is shown it will be presumed that the parties contemplated such a form of policy as has been usual between them, or is usual in such cases, and we can conceive of instances where this rule might well be applied, but this is not one of them.

"In the present case the testimony to establish the alleged contract is too vague. Although it is repeated in several different forms upon the notes, we have stated it most strongly for the plaintiff. And yet what have we? a conversation between the plaintiff and the agent of the

defendant company about renewing another insurance, in which the former said to the latter, "don't forget the barn. Renew the barn as quick as that comes due," and received the reply, "I will attend to it, you don't need to worry." How can we from this say with any safety that the defendant company thereby agreed upon an insurance in any fixed amount for any fixed term either in the present or future. The very words used by the agent indicate the intent to attend to something in the future for the plaintiff, rather than a then present assumption of an obligation binding upon his company. The old policy on the barn was in the possession of the plaintiff, so he as well as Hoch had means of information as to the date of its expiration. The whole surroundings negative the idea of a serious contract being made: the conversation consisted of a few words on the street; no money was passed, no memorandum was made, and no definite promise given on either side. After the conversation the plaintiff again instructed Hoch to watch the insurance, which would indicate that he did not consider himself protected by any binding contract at the time of the first conversation. The testimony is lacking in details essential to show clearly a contract to insure in the future, and it is also lacking in proper proof of the authority of the agent to make such a contract."

The authority of Hoch, the agent, in that case, was in writing and in substantially the same terms as the authority to Yetter in the present case. Hoch was appointed agent for certain territory "with full power to receive proposals for insurance against loss or damage by fire, * * * with authority to issue and countersign policies and renewal receipts furnished by said association, to assent to assignments and transfers, to collect and pay the premiums, and to transact such other business as may be entrusted to his care."

Yetter is appointed agent at Middletown for the defendant company "with full power to receive proposals for insurance against loss and damage by fire in Middletown, Pa., and vicinity, to fix rates of premiums, to receive money for the same and to countersign, issue, renew and consent to the transfer of policies of insurance and to make endorsements thereon or to vary the risks signed by the President and Secretary of the said

St. Paul Fire and Marine Insurance Company subject to the rules and regulations of the said company, and to such instructions as from time to time may be given by its officers."

In the Benner case the Supreme Court held at page 84, as follows, viz: "This commission cannot be construed as conferring upon the agent authority to bind and obligate his company on the unusual contract here sought to be established."

In the present case plaintiff does not seem to have understood when he renewed the $500.00 policy in December, 1909, that any valid arrangement had actually been made with Yetter, the agent for the defendant, renewing and actually continuing in force the policy expiring March 25, 1910, because he then inquired whether or not Yetter would renew that policy upon its expiration, to which Yetter replied that he would renew it. Nothing was done by the agent in December of 1909, actually renewing and continuing in force the policy for $750.00, expiring March 25, 1910. At the most he said he would renew the policy at its expiration. The plaintiff was undoubtedly anxious to have his property kept insured, and Mr. Yetter, who was in the general insurance business, was anxious to write insurance and secure his commission upon the premiums. Yetter seems to have undertaken to renew the plaintiff's insurance and the plaintiff apparently constituted him his own agent to keep the insurance upon his property alive. There is no testimony which indicates that the plaintiff and the agent of the defendant by any words in praesenti renewed the insurance contract in question here. Both expected that it would be renewed. Each understood that something further was to be done than had been done at the time of the conversations of March 25, 1905, and December 23, 1909. It was not actually renewed at either of those dates. No amount, or term, or rate was mentioned. Both evidently expected and intended that something further was to be done before the insurance was continued. The plaintiff did not take his policy at its expiration on March 25, 1910, to the agent and request that his agreement with respect to the renewal should be consummated. The agent of the defendant, according to the testimony, was sick and gave the matter no attention. The things

which both parties understood should be done were not done, and the result, as we view it, is that the insurance effected by the defendant expired on March 25, 1910, and was not in force at the date of the fire on April 9, 1910. Before an insurance company can properly be held to be bound by a renewal of an insurance contract or by an agreement that it shall be renewed or continued in force for another term than that mentioned in an original policy, full and specific authority should be shown to have been given the agent of the company for the making of such an arrangement. It is unfortunate that the plaintiff did not attend to securing the renewal of this particular policy of insurance, but there is nothing in the case which warrants us in holding, nor a jury in finding, that the insurance contract was ever actually extended, or supposed by the plaintiff and the agent of the company to have been actually extended beyond the term mentioned in the original policy.

We are therefore constrained to refuse the motion to take off the compulsory non suit.

ESTATE OF ADAM R. ROYER, DECEASED.

Executors' Account—Credits—Tombstone—Cemetery Fence—Appraising—Inventory—Decedent's Real Estate—Widow—Evidence—Partition—Lien of Debts—Decedent's Contracts—Charge for Acknowledgements—Seal.

The reasonable cost of erecting a tombstone on the decedent's grave is a proper credit in an executor's account, but the cost of erecting a fence around the cemetery lot is not properly part of the funeral expenses.

The proper charge for appraising is one dollar a day.

Five dollars is exorbitant for "stating and filing" the inventory covering a single page.

A widow is not an "heir," and has not authority over the decedent's real estate, except when ordered to sell the same by Orphans' Court.

A rulle to accept or refuse real estate appraised by the inquest in partition need not be served by the sheriff.

Administrators cannot be allowed credits for duties parceled out to others, or for traveling expenses of an agent sent to transact business which might have been transacted by mail.

A sale of decedent's real estate by order of Orphans' Court in proceedings in partition, within two years of the grant of letters of administration does not, under the Act of February 24, 1834, divest the lien of his debts.

If by reason of unfamiliarity with bookkeeping and accounting the accountant employs another to draw up his account, a reasonable amount will be allowed for such extra services.

The disqualification of a widow to testify against the estate of her husband is restricted to confidential communications and does not embrace business transactions and conversations in which others have participated.

A contract of hiring of a servant is dissolved by the death of the master or servant, but recovery should be allowed on a quantum meruit for the part performed.

A seal imparts consideration and creates a legal obligation, and want of consideration is no defense to a note under seal.

Fifty cents for one name is a proper charge by a magistrate for an acknowledgment of a deed under the Act of May 23, 1893, P. L. 117.

The proceeds of real estate sold under proceedings in partition are inherited as real estate.

A clear and express direction to sell real estate converts it into personalty.

Exceptions to report of auditor.

W. U. Hensel, W. D. Weaver, John E. Malone, and H. Frank Eshleman, for exceptions.

W. D. Weaver, for estate.

The Auditor, F. S. Groff, reported inter alia, as follows:

* * * * * * * * * *

Exception No. 16. The accountant is surcharged $17, as per agreement (minutes of audit, p. 17). The accountant is further surcharged under this exception with $80 paid for the tombstone to mark her own grave (minutes of audit, p. 11), there being no law by which such a credit can be sustained. Accountant is also surcharged with the sum of $68 for erecting a fence around the cemetery lot. This is not properly a part of the funeral expenses and cannot be allowed as such. Myers' Est., 18 Phila., 42. The $80 for erecting a tombstone at decedent's grave is a proper credit and is, therefore, allowed. A credit will be allowed the executor for a reasonable amount expended for tombstone for decedent. Porter's Est., 77 Pa., 49; Webb's Est., 165 Pa., 330.

Exception No. 18 is to a credit in the account of $400, paid A. R. Shirk, surveying, clerking and serving notices on heirs. This is a large amount, and before it can be allowed must be carefully scrutininzed. At request of counsel for the exceptants, Mr. Shirk has furnished an

itemized statement, marked "F. S. G. 8, Jan. 11, 1901," of which the following is a copy:

Appraising	2.00
Stating and filing inventory	5.00
Survey and drafting, 62 lots; also mountain land, depot, house and lot	200.00
Serving notice on heirs and ack.	75.00
Two trips to Philadelphia	30.00
Clerking sales, 6 in No.	30.00
Acknowledgment, 28 deeds	14.00
Affidavits petitions on real estate	3.00
Getting names of heirs	5.00
Borrow money	10.00
In paying dower	10.00
Make out sale list	5.00
Filing account	11.00
	400.00

The first item is appraising, $2. The appraisement was taken in one day, and for this work $1.00 per day is allowed under the tenth section of the Act of February 24, 1834. The accountant is, therefore, surcharged $1.00. The next item is for $5.00, for stating and filing inventory. An inspection of the inventory shows that it consists of but twenty-two lines, on a single page. In the opinion of the auditor this charge is exorbitant for simply stating and filing this inventory, but as it appears that the accountant also clerked the appraisement, $2.50 of this credit is allowed and the accountant is surcharged $2.50. The next item of the bill is for $200, for surveying and making drafts of real estate. This surveying seems to have been done by Mr. Shirk at the request of the widow and administratrix (minutes of audit, p. 20). A careful examination of the testimony fails to disclose that the heirs of Adam R. Royer, or any one having authority to act for them, ordered this surveying done, or even that they knew that it was being done. Nor does the evidence show that it was done under the advice of counsel for the administratrix. The interest of a widow in the lands of which her husband died seized is an estate given her by the Intestate Laws. She is not an heir. Kunselman *vs.* Stein, 183 Pa., 1; Hensel's Appeal, 77

Pa., 71; Gourley *vs.* Kinley, 66 Pa., 270. She had no authority over the real estate except when ordered to sell the same by the Orphans' Court. Transue's Est., 141 Pa., 170; Commonwealth *vs.* Coleman, 52 Pa., 468. If this were all the authority Mr. Shirk had for making the survey and drafts the auditor would surcharge the accountant with the amount expended for that purpose, but it appears from the refusal of the heirs to accept the real estate appraised under proceedings in partition filed in the Orphans' Court that they requested the Orphans' Court to grant an order or orders to Leah M. Royer, the administratrix of said decedent, "directing her to sell all the real estate aforesaid in such parts as may be for the best interest of the estate, etc." On the filing of this refusal to accept, and in pursuance of the request of the heirs, the Court, on the second day of September, 1899, ordered and directed "Leah M. Royer, the administratrix, to expose the hereinafter described real estate to sale by public vendue or outcry, and to sell the same according to law, any or all of said real estate to be divided, if desired, and to be sold in such portions as may be most advantageous to the estate of the decedent." The said Leah M. Royer was a trustee to execute the order of the court. This she did and made return of her proceedings therein to the court, setting forth that she had sold the said four purparts to the different purchasers mentioned in the return of said order of sale, showing that she had divided the same in parts, and sold the several parts or portions to some fifteen or sixteen different purchasers. The sale was confirmed by the court on November 20, 1889. No exceptions were filed, nor is there any complaint that the said Leah M. Royer did not act in good faith in carrying out the order of the court, nor is it shown that she did not sell the real estate in such parts as was most advantageous to the estate. The presumption is that she acted in good faith in making the sales in the manner in which she did. If she was to sell the same in portions or parts to the best interests of the estate it was necessary to employ a surveyor to survey and make drafts of the same. Nor does it matter that it had been surveyed and plotted by her order before. If she thought that the manner in which it had been divided into parts or portions was the most advantageous division that

could be made of it, she had a right to adopt the work of Mr. Shirk, and, it having been done for the benefit of the estate, we think the accountant should be allowed credit in the account for a reasonable amount paid the surveyor for his services. This leads to the inquiry whether $200, for which credit has been asked in the account, is a reasonable charge for the services rendered by the surveyor. The testimony of Mr. Shirk fails to show by what standard he fixed a value upon his services. He kept no account of the time he was employed.

* * * * * * * * * *

He says that the wages for surveying about Ephrata were $5 per day. A careful consideration of the testimony fails to show that Mr. Shirk could have been more than eight or ten days in all making measurements of the land. The same length of time would certainly be ample to do the plotting and drafting. On the whole we think the charge of $200 is exorbitant, and that twenty days, at $5 a day, would be a just and reasonable compensation for Mr. Shirk for the time and labor expended by him in surveying and drafting. This amount is allowed, and the accountant is surcharged $100. The next item, $75, is for serving notice on heirs and acknowledgements. This was the refusal of the heirs to accept the real estate appraised by the inquest. Mr. Shirk went to see all the heirs, got them to sign and acknowledge the refusal. This paper was filed in the proceedings in partition, and took the place of the rule to accept or refuse the real estate at the valuation or show cause why the same should not be sold, required by the Act of Assembly. The rule to accept or refuse need not be served by the sheriff. Hensel's Appeal, 77 Pa., 75; Horan's Est., 59 Pa., 152. As Mr. Shirk rendered the necessary services in this matter we think he should be paid the same as the sheriff would have been, and for the acknowledgements, and for his services for so doing the auditor finds as follows:

Twenty-eight heirs, $1.00 each	$28.00
496 miles (same as charged by the sheriff), four cents	19.84
28 acknowledgements, 50 cents	14.00
	$61.84

The difference between this amount and $75, or $13.16, the auditor surcharges the accountant. The next item is for $30, for two trips to Philadelphia (minutes of audit, p. 19). Adam R. Royer leased a tract of land beside the depot in Denver from the Philadelphia and Reading R. R. Company, on which he had a lumber yard. Mr. Shirk went to Philadelphia to see about this twice, and charged $15 each trip, making $30 in all. On page 41 of the minutes of audit it appears that a copy of the lease was afterwards sent to Mrs. Royer, or to Mr. Weaver, her attorney. We are of the opinion that it was not necessary for Mr. Shirk to have made these trips at the expense of the estate, as the matter could have been conducted by mail by Mrs. Royer or her attorney. An administrator surely must stand to render some service to the estate in consideration of the compensation allowed by law. It would be a dangerous thing for the Court to allow administrators and other trustees to parcel out their duties by piecemeal to others, and besides claiming commissions ask credit for large amounts paid others for performing the services which the law expects from them or the attorney employed by them. If this could be done it would lead to oppression. The credit is disallowed and the accountant is surcharged $30. The next item was clerking sales, six in number, $30 (minutes of audit, p. 19). Mr. Shirk says he clerked seven sales, but charged for six only. This credit is allowed and the exception, so far as this item is concerned, is dismissed. The next item is $14 for acknowledgments to twenty-eight deeds, at fifty cents each. "Every acknowledgment or probate of deed or other instrument of writing, first name, fifty cents." Justice's and Magistrate's Fee Bill, Act of May 23, 1893, sec. 1, P. L., 117. As this charge is in accordance with the above act the credit is allowed and the exception thereto dismissed.

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The next two items, borrowing money, $10, in paying dower, $10, making $20, are properly considered together, as both grow out of the same transaction. The evidence on pages 20, 40, 43, 53, 77, 78 and 79, minutes of audit, shows that what Mr. Shirk meant by borrowing money was really assigning the interest of the heirs in the Louisa Brubaker dower on a certain tract of land of

the A. R. Royer estate to Obed Shirk (see assignment F. S. G. No. 7, Jan. 11, 1901). The dower was charged on purpart No. 7 of the real estate for the use of Louisa Brubaker, widow, during life, and at her death to the heirs of her deceased husband. Louisa Brubaker was living at the death of Adam R. Royer, May 31, 1898, and died June 3, 1899. Purpart No. 7 was sold under the proceedings in partition on September 30, 1899, to D. F. Bitner, subject to this dower. The sale thereof, subject to the dower, was confirmed November 20, 1899, within two years of the grant of letters. Ordinarily a judicial sale divests the lien of the debts of the decedent, and the principal of a dower due and payable, the widow being dead, is divested by a judicial sale. But this is not necessarily true of a sale under an order of the Orphans' Court in proceedings in partition within two years of the grant of letters of administration on the estate of a decedent. A sale of decedent's real estate by order of the Orphans' Court in proceedings in partition, within two years of the grant of letters of administration, does not, under the Act of February 24, 1834, divest the lien of his debts. Wilson's Appeal, 45 Pa., 435. The dower was charged upon this particular tract of land, and the heirs could have looked for payment to no other tract had they been compelled to collect it by law. It was sold subject to the charge, and even if it had been discharged by the sale, and Mr. Bitner had assumed to pay it as a part of the purchase money, we see no reason why he could not have done so. The administratrix did not charge herself with the money that was charged on the Bitner farm, nor did she ask credit for paying the dower in her account, nor is the auditor asked to charge her with the money or to give her credit for paying it. For these reasons we think the $20 an improper credit. It is, therefore, disallowed and the accountant surcharged $20. The next item, making sale list, $5, we think this is a matter covered by the accountant's compensation, or one proper to be included in the charge for clerking the sales, where the same person who made out the sale list clerked them, six in number and received $30 for the services. The credit is disallowed and the accountant surcharged $5. The next item is filing account, $11. This Mr. Shirk explains for stating account. The account consists of eight pages.

The accountant in this case is quite an aged woman, and is evidently unfamiliar with bookkeeping and accounting. If by reason of unfamiliarity with bookkeeping and accounting the accountant employs another to draw up his account, a reasonable amount will be allowed for such extra services. Rankin's Est., 9 W. N. C., 408. The account covers many items. The credit seems a proper one and is allowed, and the exception, so far as it is concerned, is dismissed. The total amount surcharged under exception No. 18 is $176.66.

Exception No. 19 is to the credit "May 24, 1899. J. B. Zwalley, services in attending real estate and other matters, $300." The evidence touching this item will be found principally from page 100 to page 108, inclusive, minutes of audit. Mr. Zwalley seems to be perfectly frank in his testimony. He reiterates time and again that he cannot itemize his bill, nor can he tell just what services he performed for the $300. It would be very hard for an administrator or trustee whose services and responsibility are compensated by commissions on the funds passing through their hands, to itemize the services rendered and fix the value on each item. Possibly it is for this reason that they are compensated by commissions. The services rendered by Mr. Zwalley seem to be just such services as it is the duty of an administrator to perform and for the performance of which the law allows them to retain a compensation on the funds passing through their hands. Mr. Zwalley says that he managed the estate for nearly two years. He worked under the direction of the administratrix. "I did not hand the claim to the estate. I handed that claim to the administratrix, and she consented to it. I had no need to itemize the claim, she knowed all I did." On page 107 he says he has no claim against the estate. In answer to the question "How did you arrive at the figures $300 as being a proper compensation for the work you did?" he answered "By doing all the work for the administratrix that I thought was the administratrix's—was liable to do for the estate, outside signing the necessary papers, which I did that. Under that conclusion I made my charges." A further examination of the testimony shows that the services rendered by Mr. Zwalley also included the collection of rents and products, which was no part of the duty of the

administratrix. As the administratrix has claimed commissions in the account for her responsibility and labor, the credit of $300 paid Mr. Zwalley is disallowed, and the accountant is surcharged that amount.

Exception No. 20 is to the credit "May 24, 1899. Mary Afflebach, labor from April 1, 1898, to April 1, 1899, $60. The evidence of Mary Afflebach in support of her claim (minutes of audit pp. 15 and 16) shows that she was hired from April 1, 1898, to April 1, 1899, for $60. The witness is incompetent to testify what took place between her and the decedent prior to his death. Act of June 11, 1891, sec. 1, P. L., 287; Roth's Est., 150 Pa., 261. Leah M. Royer, the widow and administratrix, re-called, was objected to by counsel for the heirs. She is a competent witness to testify as she did. The disqualification of a widow to testify against the estate of her husband is restricted to confidential communications and does not embrace business transactions and conversations in which others have participated. Raub's Appeal, 1 Penny., 433; Stephens *vs.* Cottral, 90 Pa., 188. The evidence proves the contract was for a year's services from April 1, 1898, to April 1, 1899, $60. It appears that the duties which Mary Afflebach was to perform were those of a domestic servant. A contract of hiring of a servant is dissolved by the death of the master or servant. Womrath's Est. 19 Phila., 123; West *vs.* O'Callaghan, 15 Phila., 165, affirmed by the Supreme Court, July Term, 1882. No. 56. Adam R. Royer died May 31, 1898. It is true that Mary Afflebach continued in the service of his widow from that date to April 1, 1899, and for her services she was paid the sum of $60, for which credit is taken in the account, and which is the subject of this exception. The rendering of services to the widow of Adam R. Royer from the time of his death to April 1, 1899, was not rendering of services to Adam R. Royer nor to Adam R. Royer and Leah M. Royer, and was not a performance of the contract. It is not the fault of Mary Afflebach that she did not perform services for Adam R. Royer. It was impossible for her to do so after his death. The termination of a contract of the hiring of a servant by death of either master or servant is placed on the ground that death is the act of God. It is not claimed that the services of Mary Afflebach, after the death of Adam

R. Royer, were for the benefit of his estate. It is only claimed that she continued in his home and worked for his widow. Mrs. Royer says (minutes of audit, p. 16) that Mary Afflebach worked for her after the death of Adam R. Royer. This is not a performance of the contract. Her contract, being impossible of performance, under the rule which formerly applied, she could not recover protanto for the time she served Adam R. Royer, nor could she recover on a quantum meruit, having established an express contract. Cotter *vs.* Powell, 2 Smith's Leading Cases, American Notes, 9th ed., 1212. This seems to have been a hard rule of law, for if the master died the servant could not recover for the services already rendered, and if the servant died his estate could not recover from the master for the services rendered. A more just rule seems now to obtain that in such a case the servant may recover on a quantum meruit for the services rendered. The auditor is of the opinion that the estate of Adam R. Royer is not liable for any services after his death, but that Mary Afflebach should be compensated for her services up to the time of his death and for assisting at his funeral. He therefore awards her the sum of $15, and the accountant is surcharged with $45.

Exception No. 25 is to the compensation of accountant, $646.06. This is made up of $143.48, commissions on personal estate, and $502.58, commissions on real estate. The commission on the personal estate is correct, being estimated at five per cent, and so far as that is concerned the exception is dismissed. The auditor finds that the actual amount of proceeds of real estate coming into the accountant's hands from the sales of real estate for payment of debts, and also the sales under proceedings in partition, is $13,739.72. Commissions are given as compensation for labor and responsibility. It is not a question of percentage. Fiscus's Est., 13 Sup., 615. The usual commissions allowed in practice are five per cent on the personal estate and two and one-half per cent on the proceeds of real estate. This is not, however, a universal rule, compensation being allowed at a higher rate in cases requiring a longer period of settlement than usual and where more than ordinary responsibility and labor are required. There is nothing in this case showing either. The amount charged for the use of the widow

never came into the hands of the accountant. It remained in the hands of the purchasers under the Act of Assembly. She never incurred any responsibility or labor in collecting and distributing it. Commissions will, therefore, be allowed on $13.739.92 at two and one-half per cent, or $343.49. With the difference between this amount and $502.58, or $159.09, the accountant is surcharged.

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The next claim is that of Adam Schlabach, founded on a promissory note, of which the following is a copy:

$190.00. Denver, April 1st, 1890.

One year After Date we Or either of us Promice to Pay unto Adam Schlabach or order the sum of One hundred and Ninety Dollars without Defalcation for Value Received. (Signed)

I. S. BECKER. (Seal)
A. R. ROYER. (Seal)

Endorsed:
Intrest pait up to 1891.
Intrest pait up to at 5 per c 1892.
Intrest pait up to 1893 at 5 per c.
Intrest pait up to 1894.
Intrest pait up to 1895.
April the 11 intrest pait up to 1896.

The amount claimed to be due thereon is $190, with interest from April 1, 1896. The note appears to be in the handwriting of Mr. Becker, and the body, seals and signature of I. S. Becker are in ink of the same color. The signature of A. R. Royer is written with ink of a different color. On pages 2 and 3 of the minutes of audit it is admitted that the signature of A. R. Royer thereto is his genuine signature, but it is objected that the seal thereto was not affixed at the time of the signing. The signature of A. R. Royer, having been thus admitted to be genuine, the burden of proving that the seal was not affixed until after the signing is on the persons objecting. To prove a decedent's note to be a fraud and forgery requires clear and convincing evidence. Walton's Est., 4 Kulp, 487. Fraud is never presumed. It must be proven. The allegation must be precise and specific. A seal imports consideration and creates a legal obligation. In an action upon a bond or note under seal, want of consideration is

no defense. Cosgrove *vs.* Cummings, 195 Pa., 497. Under the law and evidence submitted the claim is allowed.

Note	$190.00
Int. from April 1, 1896, to date of distribution	59.47
Total	$249.47

* * * * * * * * * *

The auditor finds that the only persons entitled to participate in the distribution as heirs are the uncles and aunts of the decedent, and the children of deceased uncles and aunts. That the grandchildren of the uncles and aunts deceased cannot participate by right of representation. Act of April 27, 1855, sec. 2, P. L. 368; Brenneman's Appeal, 40 Pa., 115; Lane's Appeal, 28 Pa., 487; Perot's Appeal, 102 Pa., 225; Stewart's Est., 147 Pa., 383; Rober's Est., 131 Pa., 382.

Adam R. Ream, an uncle, living at the death of Adam R. Royer, died September 13, 1899, having first made his last will and testament, dated July 20, 1897, since his death duly proven and recorded in the Register's Office of Lancaster County in Will Book M, vol. 2, page 360, and letters testamentary thereon were in due form of law committed unto Adam J. Ream and George S. Royer, the executors therein named. The said Adam R. Ream died after the proceedings in partition were started, and after signing the refusal to accept, but before the sale and confirmation. The sale was not completed until the payment of the purchase money and delivery of the deeds. The proceeds of real estate sold under proceedings in partition is to be inherited as real estate. Schmid's Est., 182 Pa., 267; Werntz's Appeal, 126 Pa., 541; Harlan *vs.* Langhan, 169 Pa., 235. The share of Adam R. Ream in the proceeds was real estate, but his will contains a clear and express direction to the executors to sell his real estate and distribute the proceeds. It is well settled that such a direction vests title in the executors and converts the real estate into personalty. It probably would have been proper to have substituted the proper parties on the record before the sale, but as the executors now come in and claim the share of Adam R. Ream in this distribution they ratify the sale of their testator's interest. The share

of Adam R. Ream is awarded to Adam J. Ream and George S. Royer, as executors, to be distributed by them.

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Exceptions were filed to the decisions of law by the auditor.

October 19, 1901. Opinion by Landis, P. J.

The auditor has carefully and with great patience heard and passed upon the numerous exceptions filed to the account of the administratrix, and made distribution of the balance in her hands. We have gone over his report and the voluminous testimony taken during the hearing, and are satisfied that the conclusions arrived at by him are the correct ones. We cannot, if we would, add anything to what he has so fully set out in his report, and we now dismiss all the exceptions filed to it, and confirm it absolutely.

Auditor's report confirmed absolutely.

SOLON STEIN *vs.* ALSACE TOWNSHIP.

Negligenee—Contributory Negligence—Highways—Choice of Two Ways.

Failure of a township to remove snow from a public highway within a reasonable time so as to put it in a fairly safe condition for travel is negligence, making the township liable for personal injuries resulting from such negligence.

Where a public highway is in bad condition for travel, but not so dangerous as to lead an ordinarily prudent person to avoid it and take another route, it is not negligence as a matter of law to use the more dangerous road. Where there is such a choice the question of contributory negligence is for the jury.

In an action against a township to recover damages for the death of plaintiff's horse, the case is for the jury and a verdict for plaintiff will not be set aside where the evidence shows: that the township allowed snow to accumulate on a much used public highway to a depth of a foot and a half or two feet for a period of two or three weeks; that the road became full of frozen holes and ruts; that the plaintiff's horse while being driven over the road caught its foot in something, extricated itself with quite an effort and died almost immediately; and that the death of the horse was caused by a ruptured blood vessel.

Trial—Charge—Assignments of Error.

A charge is not to be judged by certain isolated sentences. It must be considered as a whole.

In the Court of Common Pleas of Berks County. No. 44, October Term, 1910. Trespass. Verdict for plaintiff. Rule for new trial and judgment n. o. v.

B. Morris Strauss for Defendant and Rules.
Ira G. Kutz, Contra.

Opinion by Wagner, J., August 12, 1912—Defendant's counsel has filed twenty reasons in support of his rules for a new trial and for judgment n. o. v. The first two are that the verdict is contrary to the evidence. The plaintiff's action is founded upon the alleged negligence of the defendant in that, for a long period of time, it allowed snow to remain in the road for a depth of from two to three feet at the place where the accident to plaintiff's horse occurred; that there were holes in the snow to a depth of from one to two feet and in diameter of from five to six inches; that on the morning of February 12th, 1910, plaintiff's horse stepped into one of these holes which was concealed by reason of a snow that had fallen during the night before, and ruptured a blood vessel, from which death ensued.

The testimony shows that on or about Christmas of 1909 a snow had fallen to a considerable depth; that at the place where the accident occurred part of the snow was removed, but that a bed, according to plaintiff's witnesses, of from a foot and a half to two feet was allowed to remain in the road; that this was a much frequented road, being the regular road used from Friedensburg to the City of Reading; that the weather becoming warm, the wagons, sleighs and horses that passed over this road made ruts and holes in the snow to a depth of one and a half feet; that some of these holes were from five to six inches in diameter; that on account of the cold weather these ruts and holes were frozen into the road bed, making it unsafe for travel. The witnesses Dry and Rieder testified that this unsafe condition of the road bed existed for a period of two or three weeks prior to the time of the accident. On the morning of the accident Solon Dry, plaintiff's employee, proceeded with a four-horse sleigh to go to Reading. A light snow had fallen during the night before and drifted the road at the place where the accident occurred to a depth, as some of the witnesses testified, of from one to two feet. Plaintiff's team becoming stalled, the snow was shoveled away in front of the sleigh. The driver, Solon Dry, then got upon the saddle horse, for the reason, as he stated, that the road was too

rough to walk. After going a few steps, the horse in question, as the driver testified, "the saddle horse caught fast, stepped down some and caught fast, and he tried to pull out * * * * he went down with the front feet * * * * he tried to pull himself out. By hard work he managed to get out again." The team then went about ten feet further, whereupon the horse dropped over and died. The scavenger, Thomas Miller, who took the horse away, and cut him open, stated that he found a ruptured blood vessesl, but could not say whether it was at the heart or at the neck. The veterinary surgeon, Dr. John B. Miller, in answer to a hypothetical question, stated that in his opinion the death of the horse was produced by a hemorrhage due to this ruptured blood vessel. The defendant claimed that this evidence was not sufficient to submit the case to the jury. In support of this position he relied principally upon the fact that there was no direct evidence to show that the horse had stepped into one of these holes that had been testified to by the witnesses to have existed in the road bed for a period of from two or three weeks; also, that the evidence was not sufficient to warrant the jury in finding that the death of the horse, even if he had stepped into one of these holes, was caused thereby and that a blood vesssel was ruptured; that the death of the horse could have occurred from a number of other reasons, such as over-exertion in endeavoring to pull the sleigh out of the snow or by strangulation from the collar. The unsafe condition of this road was described by a number of witnesses, some of whom had used it every day. Plaintiff's evidence was sufficient to warrant the jury in finding the dangerous condition of the road as testified to by plaintiff's witnesses. If this condition continued for a period of two or three weeks the township was clearly negligent. The actions of the horse just prior to his death was testified to by the driver on pages 12, 13 and 14, Notes of Testimony. From this testimony, if believed, it would seem that as the horse stepped down his foot caught in something and that it required quite an effort for him to extricate himself. Taking this action of the horse, together with the testimony as to the condition of the road, we consider the inference to be such a natural one as to warrant the jury in finding that the action of the horse was caused by his

stepping into one of the frozen holes or ruts. The horse died almost immediately after he had extricated himself. The further natural inference would be that he received an injury by stepping into the hole and trying to extricate himself and that the death resulted therefrom. The only injury that the horse was shown to have had was a ruptured blood vessel. The jury was therefor warranted in finding that the death of the horse was the result of a hemorrhage produced by this ruptured blood vessel. We consider that under the evidence in this case the question as to whether the death of the horse was caused by the alleged negligent maintenance of this road bed was a question to be submitted to and passed upon by the jury.

The third reason, that the verdict was contrary to the law, will be considered in connection with the other reasons.

The fourth reason assigned, which is also the fourth of the additional reasons for a new trial, is that the court did not unqualifiedly affirm defendant's first point. Counsel evidently refers to the second point. The charge shows that this point was unqualifiedly affirmed. It is true that we called the attention of the jury to the fact that the allegation in the declaration was not that the accident had occurred by reason of the snow that had fallen on the night of February 11th or the morning of February 12th. This was done for the purpose of clearly presenting to the jury plaintiff's position as stated in the declaration. The cause of the accident, as alleged in plaintiff's declaration, was not the recently fallen snow, but the snow that had falllen some time prior thereto and which had been allowed to remain to such a depth that deep ruts and holes were made in it, and which rendered the road bed unsafe. The case was tried in accordance with this claim of the plaintiff.

The fifth reason assigned as error the refusal to affirm defendant's second and fourth points. Counsel evidently refers to the first point. The affirmance of these points would have taken the case away from the jury, which we considered we were not warranted in doing.

The sixth and seventh reasons refer to the refusal of the court to admit certain evidence on the part of the defendant, and in admitting evidence on the part of the plaintiff. This evidence complained of is particularly

specified in the tenth, eleventh and twelfth additional reasons. That in the tenth is that the court erred in not permitting the defendant to ask Solon Dry, the driver, how long it would have taken to have shoveled this snow away at the place where his team was stuck. The evidence of the witnesses shows that the snow was to some extent shoveled away in front of the sleigh. This does not seem to have been disputed. Therefore the length of time that it would have required to have shoveled it away was not material to the case. We consider that even if the snow had not been shoveled away that the length of time required to do so would have been immaterial. The question that might have been material was whether or not the snow was of such a depth as to have required it to be shoveled away and how the not doing so would bear upon the contributory negligence of plaintiff's driver. The eleventh refers to the admission of Dr. John B. Miller's evidence, in answer to the hypothetical question. The scavenger, Mr. Miller, had testified that he found a ruptured blood vesssel. That which was material was whether this ruptured blood vessel was the cause of the death of the horse. If the jury believed the evidence that the horse had ruptured a blood vessel it was warranted in finding without this evidence of the veterinary surgeon that the horse had died therefrom. The question was founded upon facts testified to by various witnesses. The twelfth reason assigned is that the court did not permit the defendant to go into what was the actual condition of the road bed, irrespective of the snow upon it. There was no claim by plaintiff that the road bed in itself was not properly constructed or out of repair. The question, as already stated, was whether the snow was allowed to remain upon this road bed for such a length of time and to such a depth as to allow the ruts and holes to form and thus constitute negligence in the township. The question as to the actual condition of the road bed underneath the snow was not raised by plaintiff and was not at issue. This question was therefore immaterial to the issue.

The eighth reason for a new trial has already been considered in connection with the first and second.

In the supplemental reasons for a new trial defendant's counsel has assigned certain isolated sentences of the charge as error. These must in this as in all cases be

considered in connection with the entire charge: Cornelius *vs.* Central Acc. Ins. Co., 218 Pa. St. 532; Brinton *vs.* Walker & Co., 15 Pa. Sup. Ct., 449; Cox *vs.* Wilson, 25 Pa. Sup. Ct., 635, 637. The first refers to that part where the court stated "that these holes remained in there for a period of, as some witnesses testified, over two or three weeks." This was the testimony of Solon Dry and particularly of Joel Rieder, where, on page 29, Notes of Testimony, he testified that these holes and ruts had existed prior to the accident for a period of "two weeks for sure, if not three; it may have been three." This portion of the charge was not stated as a fact, but as the contention of the plaintiff, from which plaintiff claimed that the township had constructive notice of the unsafe condition of this road. One of the contentions of the defendant in this case was that because the placing of this snow upon the road was an act of providence, that therefore the township was not liable under any circumstances for the accident that had happened. In the portion of the charge assigned in the second supplemental reason as error, the court merely stated the law, that the township authorities cannot allow the snow to remain in the road for an unreasonable length of time. We further said that the township must within a reasonable time remove the snow from the road so as to put it in a fairly safe travelable condition and if it does not do that within a reasonable time, then it is guilty of negligence and in case an accident happens and a person receives an injury, it may be liable by reason of the injury or accident that may happen on account of such negligence: Wright *vs.* Lehman Township, 19 Pa. Sup. Ct. 653; Stanton *vs.* Traction Co., 11 Pa. Sup. Ct. 180.

The third supplemental reason refers to that portion of the charge wherein the court stated that if the jury should find that these holes had existed in the road for a period of two or three weeks, that then they would have a right from that to infer that the township was negligent in the maintenance of these holes. Just prior to this we stated that unless the jury should find that there were holes trodden or caused to be put into this snow as claimed by plaintiff a foot and a half to two feet in depth and of a diameter of five to six inches, they could not find for the plaintiff. Whether these holes existed or not was left

entirely to the jury to find from the evidence, together with the other matters necessary to find the negligence to entitle the plaintiff to recover under his declaration.

The sentence assigned as error in the fifth additional reason must be taken in connection with what immediately preceded and what immediately followed. The court said that if the jury should find that defendant was not negligent, that that would then be an end of the case and followed this with the statement that if they found the facts as stated in the sentence assigned as error, then the next question for them to find as alleged in the declaration was, did the horse step in a hole, fall, and thereby rupture a blood vessel, by reason whereof the horse died?

The sixth and eighth reasons refer to the question of contributory negligence. On pages 17 and 58, Notes of Testimony, the defendant had offered evidence for the purpose of showing that plaintiff had another road over which he could have gone. The only purpose for which this testimony was admissible was to show contributory negligence in plaintiff's driver in not taking this other road. There was no testimony as to the nature and kind of this road, whether it was safer than the one traveled upon, and in the sixth additional assignment of error the court explained to the jury that the fact that this road testified to had not been taken was not negligence per se. This is clearly the law: McManamon *vs.* Hanover Township, 232 Pa. St. 439 and cases therein cited. Defendant's counsel, in his address to the jury, referred to the different matters alleged by the defendant to have been negligence on the part of plaintiff's driver. The law on the contributory negligence of the driver was stated by the court on pages 6, 7, 8 and 9 of the charge, and there is no reason to suppose that the jury did not, in considering the question of contributory negligence, have in mind all the various matters claimed by the defendant to have been negligence on the part of the plaintiff's driver.

The seventh refers to the charge of the court in not explaining to them the value to be given to the expert testimony of Dr. John B. Miller. There was no request for special instructions. In view of his testimony, that the death of the horse was produced by hemorrhage due to a ruptured blood vessel, such a natural and almost conclusive inference, and which testimony was not contra-

dicted by defendant's expert, who, however, gave several additional reasons whereby the death of the horse might have happened, we do not consider there was any harm done or error committed, by not specifically referring to his testimony or explaining the value thereof.

The ninth additional reason complains of the charge of the court as inadequate and erroneous in giving undue prominence to the theory and facts of the plaintiff, and minimizing the facts of the defendant. A careful examination of the charge does not bear out this contention. The different matters as claimed for by the plaintiff were submitted to the jury. They were told that unless they so found these various facts from the evidence, that they could not find for the plaintiff. They were told that only as they found this roadbed in the condition as claimed for by the plaintiff for the length of time as claimed, that the death of the horse was caused as alleged by the plaintiff and that the negligence of plaintiff's driver did not in any way contribute to the accident, that the plaintiff could recover.

We fail to see any error in any of the reasons assigned. The rules for new trial and judgment n. o. v. are discharged.

SELLICK *vs.* PENNSYLVANIA CONTRACTING CO.

Employee—Injury to—Negligence of Foreman—Liability.

In an action for personal injuries to an employee sustained by reason of the foreman of the defendant in charge of the work directing the plaintiff to put hooks attached to a crane upon a condemned wicket and, while he was adjusting them, giving the engineer operating the crane direction to start which results in plaintiff's injury, makes the defendant liable under the Employer's Liability Act of June 10th, 1907. The foreman was acting as such within the meaning of the act which, in such a case, fixes the employer's liability.

In the Court of Common Pleas of Allegheny County. Motion for new trial.

Don Rose for Plaintiff.
John A. Metz for Defendant.

June 19th, 1912. MacFarlane, J.—Rorick, the defendant's foreman, in charge of the work, directed the

plaintiff to put the hooks on a condemned wicket and while he was adjusting them Rorick gave the engineer a signal, the engine operating the crane was started, the rope to which the hooks were attached lifted the wickets and the plaintiff was injured.

Omitting portions not applying to this case the Employers' Liability Act of June 10, 1907, P. L. 523, Purdon, vol. 6, p. 5464, is that in all actions brought to recover from an employer for injury suffered by his employee the negligence of a fellow servant of the employee shall not be a defense where the injury was caused or contributed to by the neglect of any person engaged as foreman or any other person in charge or control of the works, plant, etc.

Rorick was in charge and was directing two separate and co-operating agencies in the work. His neglect caused the injury. The language of the act is that the negligence of a fellow servant of the employee shall not be a defense in such a case. It is contended that the negligent act was not in the performance or non-performance of any of the so-called absolute duties of the employer and therefore there is no liability. These duties are to provide a safe place, safe appliances, competent employees and to give instructions and warnings when necessary. This overlooks the fact that Rorick's signal was an act of superintendency. He stood where he could see Sellick and the engineer and was directing both. In this he was acting in the capacity of foreman within the intent of the act.

In Toward *vs.* Meadow Lands Co., 229 Pa. 553, a motorman in a coal mine was killed by being thrown from his motor car which ran into a mule which had strayed on to the track. The mine owner provided a mule hole but did not provide a hitching post or gate or bar to keep the mules in the holes. The court recognized that it was a case of the negligence of a co-employee in putting the mule into a mule hole and leaving it there unhitched contrary to orders that had been given to him by his superiors, but held that it was not a defense inasmuch as the owner had been negligent in not providing bars, gates or hitching posts, and that this was a "defect in the works" under the Act of 1907. In McGrath *vs.* Thompson, 231 Pa. 631, the foreman tied a knot in a rope

and the plaintiff, a painter, fell, and the court said, "tieing a knot was not incidental to the duties of superintendence but was merely the performance of a manual act within the duties of any workman." In Remmert *vs.* P. R. R., 18 Dist. 372, Judge Stevens (p. 378) says: "The evident intention of the act was to extend the responsibility of the employer for duties committed to the employee as vice-principal and to define the liability thereby created."

Feeney *vs.* Abelson at No. 191, October Term, 1911, Superior Court (not yet reported), relied upon by counsel for defendant, is a case where the person charged with being negligent was not a foreman. He was a driver of a team drawing a rail along the ground in a junk yard and the man injured was working with him, and it was held that the jury should have been instructed that the plaintiff had failed to establish the relation of superintendent or foreman. In further discussing the case the opinion says that the injury was not a result happening through the exercise of superintendency and that the person whose negligence is that of the employer must be a representative of the employer—the vice-principal as to the particular transaction.

New trial refused.

BOROUGH OF HIGHSPIRE *vs.* H. E. JONES.

Boroughs—Ordinances—Repeal.

When two ordinances of a borough require the payment of a license for hawking and peddling, and the latter ordinance omits certain classes made subject to the earlier ordinance, and repeals all ordinances and part of ordinances inconsistent therewith, the latter ordinance repeals the earlier ordinance, and the omitted classes are exempt from the payment of the license fee.

A borough has the power to pass ordinances regulating hawking and peddling, and the sale of various products within its limits.

In the Court of Common Pleas of Dauphin County. Certiorari. No. 189, September Term, 1911.

D. L. Kauffman, for Plaintiff.
Oscar G. Wickersham, for Defendant.

McCarrell, J., March 6, 1912.

The writ in this case has brought before us the record of John K. Atticks, Esq., Justice of the Peace, in a proceeding commenced by the Borough of Highspire against H. E. Jones. The proceeding is based upon an affidavit, charging that the defendant "has been peddling bread and bread stuffs in the Borough of Highspire, Pennsylvania, for the past six months and has refused and does refuse to pay a license which has been due and is now due, in violation of two ordinances, dated respectively, January 6th, 1905, and June 7th, 1907, and passed by the Borough Council.

The justice after a hearing gave judgment in favor of the plaintiff and against the defendant for the sum of $25.00, "as a penalty for violation of two ordinances" being the ordinances referred to in the information.

The record is excepted to upon the ground that no violation of any ordinance of the Borough of Highspire is shown, and that the ordinance of 1907 repealed the ordinance of 1905, and upon the further ground that the borough had no authority to impose and collect a license fee from the defendant, who is a baker, residing in Steelton, baking and delivering his own bread to citizens of the borough.

The ordinance of January 6th, 1905, is entitled, "An ordinance requiring persons to procure a license for hawking and peddling of market produce and other articles of merchandise, and for exhibitions and amusements in the Borough of Highspire, directing to whom the license shall be paid, and providing a penalty for a violation of the same."

The second section of the ordinance provides that "every hawker or peddler of market produce or tropical fruits or any other article of merchandise not hereinafter mentioned, and every butcher, baker, grocery man, ice man, milk man, tea and coffee man, and every person canvassing from door to door for books or other articles of merchandise, shall pay to the Chief Burgess or High Constable a license fee for the privilege of the same as follows, to wit: fifty cents per day, one dollar per month, two dollars for three months, three dollars for six months and five dollars per year for each and every wagon."

The seventh section of the ordinance provides that "any person violating any of the provisions of this ordinance shall pay a fine of not less than ten dollars nor more than fifty dollars at the discretion of the convicting burgess or magistrate.

The ordinance of June 7th, 1907, is entitled:

"An ordinance regulating and licensing the business of hawking and peddling, transient dealing in merchandise, auctioneering, the ownership and use of hacks, carriages, omnibuses and other vehicles to carry persons and property for a compensation, theatrical and other exhibitions, merry-go-rounds, canvassing musical instruments, beer and other beverages."

The fourth section of this ordinance provides, as follows:

"Every huckster or peddler of garden, dairy or farm produce or tropical fruit, meats or groceries, and every hawker, peddler, canvasser or solicitor for the sale of periodicals, books, pictures, musical instruments, machinery, medicines, drugs, patent articles or patent rights, or any other merchandise or wares, by wagon or otherwise, shall take out an annual license for said business upon payment of the sum of five dollars, or a daily license of fifty cents. If more than one wagon is used in said hawking and peddling an additional fee of five dollars shall be paid for each additional wagon used."

The seventh section imposes a fine of not less than the amount of the license nor more than fifty dollars, to be collected by an action of debt or enforced by summary conviction for violation of the provisions of this ordinance.

The eighth section provides, as follows:

"All ordinances or parts of ordinances inconsistent herewith are hereby repealed."

These ordinances, as appears from their titles, are intended to cover practically the same subject matter. It is significant that in the second section of the ordinance of January 6th, 1905, hawkers or peddlers of market produce or any other article of merchandise are clearly distinguished from butchers, bakers, grocery men and others. This section specifically imposes a license fee upon butchers, bakers and grocery men, while the ordinance of June 7th, 1907, in the fourth section requires

hucksters or peddlers and hawkers and peddlers to pay a license fee, but makes no reference whatever to bakers, butchers or grocery men. The omission of the butcher and baker and others engaged in like business, seems to be a clear indication that the borough council, by the passage of this later ordinance repealing prior ordinances inconsistent therewith, relieved bakers and butchers from the payment of a license fee.

We have no doubt as to the power of the borough to pass ordinances regulating hawking and peddling and the sale of various products within the borough limits, but in the ordinance of June 7th, 1907, the borough does not appear to have exercised this power so far as regards bakers or butchers.

In the ordinance of January 6th, 1905, the butcher, baker and grocery men are expressly mentioned and made subject to the payment of a license fee. They are referred to specifically in the same action with hawkers and peddlers, indicating that the borough council did not regard a baker as a hawker or peddler.

In the ordinance of June 7th, 1907, hawkers and peddlers are expressly mentioned and are made subject to the payment of the license fee. The omission of the word "baker" in this ordinance and the failure to specifically subject a baker to the payment of the license fee clearly indicates that in 1907 the borough did not intend to subject a baker to this payment. The express repeal of all ordinances or parts of ordinances inconsistent with the ordinances of 1907 necessarily works the repeal of the ordinance of 1905 so far as bakers are concerned, and we are constrained to conclude that the borough has not subjected a baker to the payment of a license fee.

We therefore sustain the exception to the proceeding upon this ground, reverse the judgment of the magistrate, and now direct that judgment be entered in favor of the defendant.

GLASE, HALL & BOLES *vs.* THE HARVEY R. HIGH CO., JOHN A. COYLE, RECEIVER AND TRUSTEE.

Sale—Rescission—Replevin—Fraud.

In an action of replevin by the seller of goods against the receiver of the purchaser, an insolvent corporation, the plaintiffs are not entitled to recover where there was no proof of misrepresentation when the order was placed and the president of the defendant company testified that it was then solvent, but he knew it would be insolvent on a forced sale, and a few days after the goods were delivered, about two months later, the heaviest stockholder filed a bill in equity, without collusion with the officers of the company, to which they answered admitting insolvency, and the receiver was appointed and bankruptcy proceedings followed.

In the Court of Common Pleas of ancaster County. Rule for judgment for plaintiffs n. o. v.

John E. Malone and Geisenberger & Rosenthal, for Plaintiffs.

Coyle & Keller, for Defendants.

October 7, 1912. Opinion by Landis, P. J. This was an action of replevin to recover certain merchandise which had been sold and delivered to The Harvey R. High Company by the plaintiffs, and which, when the writ issued, was in the possession of John A. Coyle, as receiver of said company. The facts are not in dispute, and the sole question arising is whether, under them, the verdict ought not to have been for the plaintiffs.

The Harvey R. High Company began business about February 1, 1911, and it continued the same until September 7, 1911, when a receiver was appointed for it by the Court. The cash capital of the company was $10,000. In July, 1911, certain merchandise, consisting of blankets, to the value of $774.85, was ordered by some one connected with the company from Mr. Rife, who represented the plaintiffs, the goods to be delivered to The Harvey R. High Company on either September 1 or 15, 1911. On September 1, 1911, nine packages came by Philadelphia and Reading freight, directed to The Harvey R. High Company, and on September 2 these packages were delivered to the Keystone Express Company, who paid the freight. There was an arrangement between The Harvey R. High Company and the Keystone Express Company that the latter should pay all freight on goods of The Harvey R. High Company, and then collect it and

the drayage from The Harvey R. High Company. The express company delivered these goods into the storeroom of The Harvey R. High Company, and they were the goods replevied and were identified as those sold by the plaintiffs. They were intact, except as to one or two packages which had been broken in transportation, when the writ of replevin was issued and served. There was no proof that any misrepresentation was made when the order was placed, and the president of the defendant company, the only witness called upon the point, stated that the company was solvent at that time. On September 6, 1911, S. R. Slaymaker, the heaviest stockholder, decided to file a bill in equity for a receiver. There was no evidence that there was any collusion between him and the officers and directors of the company in this regard; but, when this determination was made known to them, the directors agreed to file an answer, admitting the insolvency, and this was accordingly done. John A. Coyle, Esq., was appointed receiver, and subsequently, the company having been thrown into bankruptcy, he was elected trustee in bankruptcy. It was testified that in July, 1911, the assets were $47,000, and the liabilities $39,000, and that, when the goods were ordered, the president had no reason to believe that the company was insolvent, and he said, in his judgment, it was not; that he knew it would be insolvent on a forced sale; that they had the merchandise, but were not able to turn it for the money to pay these bills. The Court, upon the trial, directed a verdict in favor of the defendant, and in my judgment, the case could not have been determined otherwise.

In Collings Tailor Company *vs.* Appenzellar, 42 Sup., 414, it was held that, "in an action of replevin by the seller of goods against the receiver of the purchaser, an insolvent corporation, the plaintiffs are not entitled to recover where it appears that the goods were ordered honestly; that, before they were delivered, the corporation knew that a bill in equity had been prepared and would be presented with a request for the appointment of a receiver, and that the company would make no defense thereto, but would admit the truth of the allegation of the bill; that, at the time it received the goods, the company knew that it would be unable to continue business;

and that the company did not disclose these facts to the plaintiffs, who were wholly ignorant of them, although no fraud, misrepresentation or collusion had been practiced." The facts of that case are not as strong as those which here appear. There it was shown that the Chambersburg Woolen Company ordered from the plaintiff, doing business in Ohio, goods to be delivered f. o. b. cars Chambersburg; that the plaintiff accepted the order, shipped the goods on December 31, 1907, and on January 6, 1908, they were delivered by the railroad company to the buyer; that, on the following day, a bill in equity was filed against the woolen company by certain of its creditors, in which it was averred, inter alia, that the company was not able to meet its obligations nor to convert its assets into cash for the purpose of paying them, etc. To this bill an answer was filed on the same day by the woolen company, through its president admitting the truth of the allegations, whereupon the Court appointed receivers. Two days later the plaintiff, upon hearing of the insolvency of the company and the appointment of the receivers, notified the latter of their recission of the contract, and requested them to return the goods to them. Rice, P. J., in delivering the opinion of the Court, said: "The question for decision at this stage of the case is: Did the receiving and retaining of the goods, under the circumstances stated, amount to such fraud in law as entitled the seller to rescind the sale and reclaim the goods, even after they had gone into the hands of the receivers? In order that there may be no misunderstanding as to the precise question for decision, it seems well to note that it is not alleged that, at the time the woolen company ordered the goods, it did not honestly intend to pay for them, or that the equity suit was instituted or carried on through collusion between the plaintiffs in the bill and the woolen company, or at the latter's suggestion, or that, in filing an answer admitting the allegations of the bill, it did not answer truly, or that there was any ground upon which it could resist the granting of the decree prayed for. The absence of these facts, it seems to us, distinguishes the case from Bughman *vs.* Central Bank, 159 Pa., 94, and Claster *vs.* Katz, 6 Pa., Superior Ct., 487, upon which appellant's counsel rely as controlling authorities. In the former case the purchasers,

before delivery into its barges of all of the coal ordered, not only committed an act of insolvency by confessing judgment and giving a bill of sale of practically all its coal boats, including the two barges in question, but in fact disabled themselves from continuing their business and practically brought it to an end. The Court said: 'This was a most material fact in the transaction. It was such a change in circumstances as the vendor was entitled to know, and it does not admit of doubt that, if he had known it, he would not have delivered the coal. . . . . In Claster *vs.* Katz, it was said that the confession of judgment by a buyer of goods between the purchase and delivery of the same is not, per se, such a fraud upon the seller as entitles the latter to rescind the sale. 'But where, in addition to insolvency known to the buyer and undisclosed to the seller, the buyer, before the delivery of the goods, confesses a judgment which is enforceable at once, and he knows that the effect of its enforcement will be to disable him from continuing his business and to bring it to an end, and it is so used, these additional circumstances are sufficient, in our opinion, to take the case out of the strict rule of Smith *vs.* Smith and kindred cases.' In the present case, the woolen company did nothing and the plaintiffs in the bill in equity did nothing before the goods were delivered to the former by the railroad company to change the conditions, and it is distinctly averred in the affidavit of defense that the condition of the company was the same at the time of its receipts of the goods as it was when they were ordered. . . . The mere fact that the woolen company intended not to resist the equity suit, which it expected would be instituted on the following day, does not, in our opinion, put the plaintiffs' claim to rescind, and especially to reclaim the goods after they went into the hands of the receivers, upon a higher plane either of law or morals than would the fact, which is not alleged, that when it ordered them it intended not to pay for them." In Reed *vs.* Felmlee, 25 Sup., 37, it was decided that "an intention even of an insolevnt buyer at the time of the purchase not to pay will not amount to fraud, unless some false representation, trick or artifice, or conduct which involves a false representation, be added." See also Smith *vs.* Smith, Murphy & Co., 21 Pa., 367; Robertson *vs.* Robert-

son, 9 Watts, 32. In Shirk *vs.* Konigmacher, 3 Sup., 45, a purchaser of chattels confessed judgment a week after the purchase, and the chattels were seized in execution. In an interpleader between the vendor and the execution creditor, it was held that the latter was entitled to binding instructions, there being no evidence of fraud. The cases of Bughman *vs.* Central Bank, 159 Pa., 94, and Claster *vs.* Katz, 6 Sup., 487, are as clearly distinguishable from this case as it is shown by Judge Rice they were distinguishable from the case of Collings Tailor Company *vs.* Appenzellar, supra.

For these reasons the rule for judgment non obstante veredicto in favor of the plaintiffs is discharged.

Rule discharged.

Note.—See next case.

THE TOPKEN CO. *vs.* THE HARVEY R. HIGH CO., JOHN A. COYLE, RECEIVER AND TRUSTEE.

Sale—Passing of Title—Recission—Replevin—Fraud.

In an action of replevin by the seller of goods against the receiver of the purchaser, an insolvent corporation, the plaintiffs are not entitled to recover where there was no proof of misrepresentation when the order was placed and the president of the defendant company testified that it was then solvent, but he knew it would be insolvent on a forced sale, and a few days after the goods were delivered, about two months later, the heaviest stockholder filed a bill in equity, without collusion with the officers of the company, to which they answered admitting insolvency, and the receiver was appointed and bankruptcy proceedings followed.

Where goods are ordered to be shipped on a specified date and are shipped before that date and received by the buyer, the title does not remain in the seller and he cannot rescind the sale and reclaim the goods prior to that date.

In the Court of Common Pleas of Lancaster County. October Term, 1911. No. 14. Rule for judgment for plaintiff n. o. v.

O. S. Schaeffer, for Plaintiff.
Coyle & Keller, for Defendant.

October 7, 1912. Opinion by Landis, P. J.

In this case an action of replevin was issued, to recover certain merchandise, which had been sold and

delivered to The Harvey R. High Company by the plaintiff. At the time the writ was issued the merchandise was in possession of John A. Coyle, as receiver of that company. The main facts are very similar to those set forth in the case of Glase, Hall & Boles, *vs.* The Harvey R. High Co., et al., October Term, 1911, No. 13, in which an opinion has been recently handed down by this Court. The sole question is, whether the verdict ought not to have been for the plaintiff.

The uncontradicted evidence is that, in May or June, 1911, Harvey R. High, the president of The Harvey R. High Company, and authorized to make contracts, made an agreement with the plaintiff's representative for the purchase of 101 dozens of gloves called "Excellent," at $5.25 per dozen. These gloves were to be shipped on September 15, 1911, and there was a credit allowed of from thirty to sixty days. The gloves were shipped and were received and placed in the stock or storage room of The Harvey R. High Company before September 7, 1911. On that day a bill in equity was filed against the company, praying for the appointment of a receiver, and the store was then closed and not afterwards reopened. At that time this merchandise was in the original cases and remained so up until the time it was replevied. Harvey R. High testified that he had no knowledge that the goods had arrived before the issuing of the writ; that he himself did not receive goods, but that a man was employed expressly for that purpose, and that, when goods were delivered at the store, it was the duty of this man to take them up on the elevator to the storage room. High also testified that there were no representations of any kind made to the agent when the goods were ordered, and that he had no knowledge that the company was insolvent up to the time of the filing of the bill. Under this state of facts, the Court directed the jury to render a verdict in favor of the defendants.

It seems now to be insisted on that, as the goods were to be shipped on September 15, 1911, the title to them remained in the vendor at the time when the receiver was appointed, and that for this reason the vendor had a right to rescind the contract and re-take the goods. We, however, do not think that the law sustains such a contention. It seems to us that, while the

plaintiff was not bound to ship the goods before the day fixed by the contract, and the vendee was not bound to receive them before that date, yet if the vendor saw fit to anticipate the time and send the goods, and they were placed in the possession of the buyer, the vendor is in no position to disavow his act and maintain the claim that he still is entitled to possession. In the case of Sole-Leather Over Mfg. Co. *vs.* Bangs, et al., 44 Northwestern Reporter, 671, it was held by the Supreme Court of Minnesota that when goods are ordered and they are sent before the time specified in the order, the buyer waives the objection that they are prematurely sent by receiving them and not objecting within a reasonable time. Certainly, the converse of the proposition is equally true, that by prematurely sending the goods the seller has elected to part with his property and deliver it to the buyer before the stipulated time.

We think that all the other points that can arise in this case are governed by the principles fully set forth in Glase, Hall & Boles *vs.* The Harvey R. High Company, et al., supra, and it is therefore unnecessary to here repeat them. We are of the opinion that the case was properly decided upon the trial, and that this rule must be discharged.

IN RE INDEXING OF DEEDS AND MORTGAGES IN THE RECORDER'S OFFICE.

Indices—Change of Mode—Jurisdiction of Court—Constitution—Act of May 26, 1891, P. L. 129—Alphabetical System.

The Act of May 26, 1891, P. L. 129, empowering the court of common pleas to change, alter and direct the mode of preparing and keeping indices in the several offices of record, and for preparing, making and substituting new indices or parts thereof, is constitutional.

What is an alphabetical system of indexing?

In the Court of Common Pleas of Lehigh County. No. 50 September Term, 1912. Petition to change method of Indexing Deeds and Mortgages.

Lawrence H. Rupp, for Committee of Bar Association.

E. J. Lichtenwalner and George D. Taylor, for Petition to Revoke Decree.

W. H. Schneller, for Recorder of Deeds.

Trexler, P. J., October 28, 1912. On the initiative of the Lehigh County Bar Association, the attention of the Court was called to the bad condition of the indexes in the Recorder's office. The Bar Association appointed a committee to investigate the various modern systems of indexing records, and the committee, after spending much time and labor comparing the various systems, unanimously reported in favor of what is known as the Russell system. The Court adopted said system by a decree which has been duly entered, and the present matter is before the Court on a petition to revoke the decree for the reason that the Act of May 26, 1891, P. L. 129, under which the decree was made, is unconstitutional.

The first contention is that it violates Article 2, Section 1, of the Constitution which provides:

"The legislative power of this Commonwealth shall be vested in a general assembly, which shall consist of a Senate and House of Representatives;" that the power of legislation cannot be delegated, and that in giving Courts the right to determine what system of indexing may be used, it is conferring on them the power to make laws in regard to this subject matter.

I consider the fixing of the method of indexing records to be an administrative function, and as it partakes of an executive and administrative character, it is clearly capable of delegation. It would be impossible for the Legislature to work out all the details. It must leave to co-ordinate or subsidiary departments the working out of the details. This is true, not only in municipalities, but as to offices and departments.

The Supreme Court of this State, by virtue of the Act of Assembly of June 16, 1836, P. L. 789, formulates rules in regard to equity practice, which rules have the same effect, as acts of assembly legally enacted. Yetter *vs.* Del. Val. R. R. Co., 206 Pa. 485.

Various acts of assembly give large discretion as to details to courts, councils of cities, supervisors, boards of health and others. To refer to them would unduly

lengthen this opinion. Whilst these acts may appear in some cases to be of the nature of legislative, they are of necessity, as the Legislature cannot possibly cover every detail of the operation in the act of Assembly, and must leave certain matters to those charged with the carrying out of its provisions. O'Neill *vs.* Insurance Co., 166 Pa. 72; Com. *vs.* Shafer, 32 Pa. Sup. 497; Foster Township Road Tax, 32 Sup. 51; McGonnell's License, 209 Pa. 327.

It is further urged that said Act of 1891 violates Article 3, Section 7, which provides that "the General Assembly shall not pass any local or special law authorizing the creation, extension or impairing of liens, and Article 3, Section 7, which prohibits local or special laws regulating the affairs of counties.

I do not consider the act is local in its operation. It applies to all the counties of the Commonwealth. It confers similar powers upon all the judges. That some judges may not exercise the power does not make the legislation special. If the act conferred the power only on the judges in some counties, then the cases cited would apply. The case of Beaver County Indexes, 6 Pa. Co. C., Rep., 525, is not in point. The Act of 1891 does not contain the objectionable features which were included in the Act of May 3, 1878, P. L., 43, and upon which features that decision is premised. I am of the opinion the Act of May 26, 1891, P. L. 129, is constitutional.

If the Act of 1891, however, were unconstitutional, we would be governed by the Act of March 18, 1875, P. L. 32, which provides a method of keeping indexes. Although it does not require the intervention of the Court in order to obtain the indexes provided by said act, there has nothing been done in the present proceeding contrary to the provisions of said act. The order of Court made would not invalidate the act of the Recorder. The Act of 1875 provides that the index shall contain a direct index and a grantee or ad sectum index; that it be arranged alphabetically and in such a way as to afford an easy and ready reference to said deeds and mortgages respectively.

I have carefully examined the sample volume prepared under the Russell system and find it to be an alphabetical system. The primary index contained in each volume is practically the old Campbell method of

indexing. There is added thereto a supplementary index which distributes the surnames according to five controlling letters, namely L, M, N, R and T, and by such arrangement makes it more convenient to search the records. But it is nevertheless arranged alphabetically, and is easily covered by the language of the Act of 1875.

I might add in closing that the Russell system has been adopted by seven counties of the State of Pennsylvania including Allegheny and Dauphin, and that the question of the constitutionality of the Act of 1891 seems not to have been raised, and this of itself may be regarded as persuasive evidence of its constitutionality.

Now, October 28, 1912, the petition is dismissed at the cost of the petitioner.

YOST *vs.* LAUER.

Easement—Water—Extent of User-Prescription.

Where the owner of land openly uses water flowing through his land continuously and without interruption for twenty-one years under claim of right, he acquires an easement by prescription, and the extent of his use of the water is not affected by the limitations contained in a grant by the owner of the land on which the water rises to a third party.

In the Court of Common Pleas of Berks County. No. 22, January Term, 1911. Trial and verdict for plaintiff for $200. Rule for new trial.

Harvey F. Heinly for Defendant and Rule.
C. H. Ruhl, Contra.

Opinion by Endlich, P. J., June 22, 1912. This is an action for the obstruction of a flow of water from defendant's through plaintiff's land. The right alleged to have been infringed is averred to exist by prescription. As such the questions of its existence, extent and impairment were submitted to the jury, who found for plaintiff. It is now contended that due weight and effect were not given to certain writings claimed to have a material bearing at least upon the quantum of the water demand-

able by plaintiff, and therefore upon the quantum of his damages. One of the writings referred to is a deed of Dec. 24, 1790, in which the grantor as owner of a tract now belonging to defendant grants to the owners of the tract now belonging to plaintiff and of a third tract now also owned by defendant the right, under certain restrictions, to the water arising on the first mentioned tract to be led over (as it is asserted) the second tract to and for the benefit of the third. The other is an agreement dated Feb. 19, 1822, and in its body stated to be between the then owners of the second and third and a fourth tract, relating to the distribution among them of the water coming from the first or upper tract now belonging to defendant, but executed and acknowledged only by the owners of the third and fourth. So far as this latter instrument is concerned, it is manifest that, no party in the line of plaintiff's title having joined in it, it can have no effect upon his rights in this action.

As for the deed of 1790, let it be conceded, although it is by no means clear, that it applies to the particular water course here involved. On that assumption it provides for the conducting of water arising on defendant's property over the plaintiff's property, in a certain open ditch traversing the latter, to and for the benefit of a third tract, which in 1790 was the property of the then owners of the plaintiff's tract, and which has since, like the tract on which the water arises, become the property of the defendant. According to a long and uniform line of decisions (see Hotel Co. *vs.* Baldwin, 12 Montg. Co. 145) going at least as far back as Seibert *vs.* Levan, 8 Pa. 383, and coming down to Com. *vs.* Burford, 38 Pa. Super. Ct. 201 (Affirmed in 225 Pa. 93), this arrangement, as the ownership of the several tracts then stood, subjected that now belonging to plaintiff to an easement in favor of the third, the right and liability to which survived subsequent changes in the ownership of either. On the other hand it gave a right to the water arising on what is now defendant's upper tract in conformity with its terms. True, that right was restricted and was given for the benefit of the third tract, not the tract through which it passed. But it does not follow that after the severance of the ownership of the plaintiff's tract, its owner could not acquire by prescription a right to the use of the

water flowing through the ditch on his land, and thereby to a flow of it in the ditch sufficient for such use. Where a right is expressly granted to be exercised within certain limits, an exercise of it even by the grantee in excess thereof continuously, etc., for 21 years under claim of right, may give rise to a presumption of a second grant super-added to the first: Gehman *vs.* Erdman, 105 Pa. 371. A fortiori, a similar use, for a like period, of water passing over the land of one not a party to the original grant of the water may create a right by prescription to such use, and in the nature of things as against the owners of the tract on which the water arises, the extent of the use made of the water by such intermediate owner would, upon a familiar principle: see McManus *vs.* McIlvaine, 2 Woodw. 146, 148, be the measure of the right acquired. The limitations in the grant of the water for the benefit of the third tract would obviously not be controlling; for the question is neither one between that tract and the tract on which the water arises, nor one between the servient and the dominant tenements, but one between the tract through which the water flowed and the tract on which it arises, as between the owners of which, in respect to the tract now owned by plaintiff, the arrangement of 1790 established no right to the use of the water and of course no restrictions upon such use. Neither is it apparent how the question as it is here presented could be effected by the circumstance that the owner of the tract on which the water arises has become also the owner of the tract for the benefit of which the grant of 1790 was made. As owner of the latter tract he might, of course, waive the supplying of it; but he could not thereby abrogate any rights in the meanwhile acquired by the owners of the plaintiff's tract to a supply for its uses.

It would thus appear that the case upon the evidence concerning the use made of the water on plaintiff's tract by the successive owners thereof after the ownership of that and of the third tract had ceased to be in the same person, and that the submission of it to the jury was upon substantially correct lines. If so, it cannot be doubted that the verdict was warranted by the evidence and ought not therefore to be disturbed.

The rule to show cause is discharged.

ERRATA.

In re Indexing of Deeds and Mortgages in the Recorder's Office, reported on page 107, the names of counsel should have been as follows:

E. J. Lichtenwalner and George D. Taylor, for Petition to Revoke Decree.

Lawrence H. Rupp, for Siegel-Russell Indexing Co.

James L. Schaadt, Morris Hoats and R. A. B. Hausman, Committee of Bar Association.

W. H. Schneller, for Recorder of Deeds.

Max S. Erdman, for County Commissioners.

We regret the error, more particularly as the Committee for the Bar Association and the Solicitor for the County Commissioners deserve special mention, for their interest and labor in obtaining new indices. EDITORS.

AITKEN, SON & COMPANY *vs.* LEAF, ET AL.

Foreign Attachment—"Residence"—Husband and Wife—Domicile—Presumption of Domicile.

Under the foreign attachment act 13 June, 1836, P. L. 568, as amended, a defendant is not a "resident within this Commonwealth" where the evidence shows that she originally resided in Pennsylvania, separated from her husband who continued to reside in Pennsylvania, went to New York State, where, by her statement under oath, she lived and worked continuously without her husband's support for a period of four years up to and including the date of the issuance of the writ.

Although a husband's domicile is prima facie that of the wife, yet when the necessity arises which justifies the wife in leaving her husband, she may acquire a domicile of her own.

The presumption is that the place where a person lives is his domicile when he has no family elsewhere, but this presumption may be rebutted.

"Residence" is constituted by the fact of abode with intention to remain.

In the Court of Common Pleas of Berks County. No. 46, December Term, 1908. Rule to show cause why writ of foreign attachment should not be quashed.

George J. Gross for Defendant and Rule.

C. H. Ruhl, Contra.

Opinion by Wagner, J., November 11, 1912.—The only question raised upon the rule to show cause why the

writ of foreign attachment should not be quashed is whether the defendant at the time of the issuance of the writ was a non-resident of this State. The Foreign Attachment Act of June, 1836 (P. L. 568), amended by the Act of March 30, 1905 (P. L. 76), which amendment was still in force at the time this writ of foreign attachment was issued, provides: "A writ of attachment * * * may be issued against the real or personal estate of any person not residing within this Commonwealth, and not being within the county in which such writ shall issue, at the time of the issuing thereof."

What then is meant by the word residing as used in this act? In Pfoutz *vs.* Comford, 36 Pa. St. 420, a foreign attachment proceeding, "residence," on page 422, is thus defined: "Residence is, indeed, made up of fact and intention; that is, of abode with intention of remaining." (See also Carey's Appeal, 75 Pa. St. 201, 205; Fry's Election Case, 71 Pa. St. 302, 309; Hindman's Appeal, 85 Pa. St. 466; Price *vs.* Price, 156 Pa. St. 617, 626.

What therefore constitutes residence is not merely the fact of physical presence, but coupled with that the intent to remain at the place of physical presence without any present intention of removing therefrom. Residence as thus used in foreign attachment has the same meaning as the word domicile: Hindman's Appeal, supra; Carey's Appeal, supra. It is not denied that at the time the writ of foreign attachment issued this defendant was absent from the State of Pennsylvania and had been for some time in New York State. The defendant claims, however, that the second requisite to constitute residence in New York, the present intention not to remove from Pennsylvania, was wanting. The only evidence submitted to determine this disputed question of intent is that given on the part of the plaintiff, upon whom rests the burden of establishing residence: Elise *vs.* Fahnestock et al., 29 Lancaster Law Review, 59; Sibley et al. *vs.* Dougherty, 9 Kulp, 185; Brace *vs.* Johnson, 19 Dist. Rep. 595; Lopez *vs.* Donohue 15 Dist. Rep. 349.

The testimony of plaintiff's witness, Morris Loekle, is that he knew the defendant since July 14, 1908; that since he has known her she has resided at Tarrytown, New York, where she was for some time House Mother of the Irving School, and that she has resided in the

State of New York continuously since prior to the year 1908. His depositions were taken on June 28, 1912. It will therefore be seen from this uncontradicted testimony that defendant has been in Tarrytown, New York, continuously for a period of over four years. This witness further testified that in a proceeding, on behalf of the plaintiff in this case, supplementary to execution against defendant, that this defendant was examined under oath respecting her residence and domicile. The certified copy of this testimony shows that defendant testified that she lived at the Irving School, Tarrytown, New York; that she was the House Mother of the Irving School; a married woman; that her husband's name is Richard T. Leaf, who resides at 153 North Fourth street; that she owns real estate in Pennsylvania; that she had five children, none of whom are with her, but that they are in Philadelphia and Brooklyn; that she uses the income derived from her real estate for her support and maintenance; that her husband does not contribute to her support or that of the children. We have therefore a person whose physical presence for a period of over four years has been in Tarrytown New York; that she testified under oath that she lived there; that she is separated from her husband and receives from him no support; that her occupation is that of a House Mother at Irving School, located in New York State.

As bearing upon the intent necessary to constitute her a non-resident of Pennsylvania at the time of the issuance of the writ, at the argument it was claimed by defendant's counsel that the husband's residence controls the wife's. This is undoubtedly the case when the two are living together, and is thus stated in Barning, Appellant, *vs.* Barning, 46 Pa. Sup. Ct. 291: "Following out the theory of an identity of person, the law fixes the domicile of the wife by that of the husband and denies to her during cohabitation the power of acquiring a domicile of her own separate and apart from him: 14 Cyc. of Law and Procedure, 846." It is, however, also equally true that when she is living separate and apart from her husband she can acquire a domicile of her own. This is recognized in all divorce cases in our state, where the wife, upon the ground of her bona fide residence in the state, is entitled to institute a divorce proceeding against the husband, a

resident of another state: Reed, Appellant, *vs.* Reed, 30 Pa. Sup. Ct. 229, 236. This is also the law in New York. In White *vs.* Clover, 116 N. Y. Sup. 1059, the court, on page 1060, say: "A husband's domicile is prima facie that of the wife; but, when the necessity arises which justifies the wife in leaving her husband, she may acquire a domicile of her own. Hunt *vs.* Hunt, 72 N. Y. 217, 242, 243, 28 Am. Rep. 129." In Elwell *vs.* Elwell, 128 N. Y. Sup. 495, it is held: "Where a husband without lawful cause excludes his wife from their home in another state, she may acquire an independent and separte domicile in New York."

In 14 Cyc. of Law and Procedure, 858, the presumptive domicile arising from presence is thus stated: "The place of residence is prima facie that of domicile;" in A. & E. Enc. of Law, Vol. 10, page 22: "The presumption is that the place where a person lives is his domicile when he has no family elsewhere, but this presumption may be rebutted." This presumption exists in Pennsylvania. We have, in Carey's Appeal, supra, page 205, "So, though the residence be taken for a temporary purpose, intention may change its character to a domicile, but prima facie the place of residence is the domicile until other facts establish the contrary;" in Hindman's Appeal, supra, page 469: "This unequivocal act of moving from the state and taking up his residence in another state, is very strong evidence of the establishment of a domicile in the latter;" in case of Guier and O'Daniel, reported in 1 Binney's Reports, 348, note (a): "A man is prima facie domiciled at the place where he is resident at the time of his death; and it is incumbent on those who deny it, to repel this presumption of law, which may be done in several ways." This presumption also exists in New York: Kennedy *vs.* Ryall, 67 N. Y. Rep. 379, 386. The defendant did not attempt by testimony to rebut this presumption thus created. On the contrary, her sworn statement is that she lived at Tarrytown, New York, and that her occupation, that of a House Mother, is there. By the term "domicile" in its ordinary acceptation is meant the place where a person lives or has his home: Fry's Election Case, supra, 309.

From a careful consideration of the entire evidence, together with the law bearing thereon, we find that at the

time of the issuance of the writ of foreign attachment, the defendant was not a resident of Pennsylvania.

Rule to quash is discharged.

MORRISON *vs.* PAGE WOVEN WIRE FENCE CO.

Witnesses—Adverse Interest Under Section 5 of Act of 23 May, 1887, P. L. 158, in a Proceeding by Widow Under the Acts of 15 April, 1851, P. L. 699, and 26 April, 1855, P. L. 309.

Where a suit is brought by a widow under the Acts of 15 April 1851, P. L. 669, and 26 April, 1855, P. L. 309, although predicated on the injury resulting from her husband's death is nevertheless for a cause of action he did not have nor did it pass from him in any way, but is for the vindication of a right bestowed upon her personally, and the adverseness of the interest of a witness to that right does not disqualify him under the Act of 23 May, 1887, P. L. 158, for the person possessed of that right, is in full life and may fully speak for the vindication of the right, no right "of such deceased party" having passed. The situation, however, would be different where, under the 18th section of the Act of 15 April, 1851, P. L. 669, suit was brought by the injured party for the injury he sustained, and when he subsequently died, the action survived and was to be carried on by his legal representative; in which case the interest which renders a witness incompetent is an interest which shall "be adverse to the said right of such deceased pary."

In the Court of Common Pleas of Westmoreland County, No. 508 November Term, 1911. Motion for new trial.

Gaither & Whitten, for Plaintiff.
Moorhead & Smith, for Defendant.

McConnell, J.—The verdict in this case was in favor of the plaintiff for the sum of eleven thousand dollars. There is a motion for judgment non obstante veredicto. The defendant at the trial asked for binding instructions in favor of the defendant, which motion, for reasons then given was refused by the Court. The present motion is based on the same grounds as the motion for binding instructions was based on, and must be refused, for the reasons then given. The whole record requires a submission of the case to the jury.

There is also pending a motion for a new trial. The second and third reasons relate to the rejection of the

proposed testimony of George S. Bowes, superintendent of the open hearth department. The testimony of the witness was pertinent to a material point in the case. If he was a competent witness, the injury involved in the rejection of his testimony can only be cured by granting a new trial. He had answered on his voir dire that he was a stockholder in the defendant company. Objection was made that that kind of an interest in the suit rendered him incompetent, David Morrison, on account of whose death the suit was brought, being dead. The objection and the answer thereto then only invited attention to the kind of interest the witness had in the defendant company, and called for an answer predicated on the nature of that interest. The Act of 23 May, 1887, section 5, P. L. 158, provides as follows: "Nor where any party to a thing or contract is dead, or has been adjudged a lunatic and his right thereto or therein has passed, either by his own act or by the act of the law, to a party on the record who represents his interest in the subject in controversy, shall any surviving or remaining party to such thing or contract, or any other person whose interest shall be adverse to the said right of such deceased or lunatic party, be a competent witness to any matter occurring before the death of said party," etc. Whether a stockholder's interest in the defendant company would be of such a nature as to suffer diminution in the case of a verdict against his company, was the point to which attention was directed when the evidence was excluded. It has been held that, at common law, the interest of a stockholder in litigation whereby the assets of the corporation would be increased or diminished made him directly interested in the result, and he was, therefore, incompetent as a witness. In Gautt *vs.* Cox & Sons, 199 Pa. 298, a witness had been rejected because he was an officer of a corporation. The Court says: "This was technically an error. The officers of a corporation not shown to be stockholders, prima facie, are mere agents or servants having no direct interest in the suit which precluded them from being witnesses at common law, or enables the opposite party to call them under the statute as if for cross examination." The cases are collected by Judge Van Swearingen in the case of Greensburg B. & L. Assn. *vs.* Bates, 19 District Rep. 224. It seemed to the

Court on the point of view then taken that the interest of the witness was of such a nature as to exclude him because it was an interest to be affected by the result, and it was adverse to the right of the deceased.

But a question, then unconsidered, now presents itself: What right of the deceased was at issue in the suit to which the interest of the witness was adverse? To exclude the witness under the Act of May 23, 1887, P. L. 158, he must be a "person whose interest shall be adverse to the * * * right of such deceased * * * party." This suit is brought by Margaret Morrison, the widow of David Morrison, the deceased, to recover for the pecuniary loss that she and the minor children sustained by reason of the death of David Morrison.

The general assemlby in the act of April, 1851, and in the Act of April 26th, 1855, P. L. 309, has created the right that has been sued for in this case and has bestowed it directly on the present plaintiff and not on the deceased. In section 1 of the last mentioned act, we find "that the persons enitled to recover damages for an injury causing death shall be the husband, widow, children or parents of the deceased and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that without liability to creditors." This suit is brought pursuant to that provision. David Morrison brought no action for his injury. This suit although predicated on the injury resulting from his death, is, nevertheless, for a cause of action that he did not have, and did not assign, nor did it pass from him in any way. It was a right directly bestowed on the widow by the act of assembly, and not one coming to her through any form of trasmission from her husband or his estate. The sum recovered was in no wise to be answerable for any debts that he might have had, but was designed to compensate his widow and children for the loss they sustained, on their own account, by the premature death of the husband and father. In the case of Hamill *vs.* Supreme Council, 152 Pa. 537, a beneficial association had contracted to pay to a wife of a member a certain sum, on the death of her husband. In a suit by her to recover the benefit thus secured for her, after her husband's death, it was held that the surviving members were competent

witnesses to show that their fellow member, the plaintiff's husband, was not in good standing at the time of his death, and that, therefore, the plaintiff was not entitled to recover. The testimony thus given would of course, be adverse to the claim of the plaintiff predicated on the fact of decedent's death, but would it be adverse to any right that ever vested in the deceased and passed from him to the plaintiff? It was decided that no such right was secured by the contract to the deceased and, therefore, there was no disqualification in the surviving members in testifying adversely to the claim in suit. "In such a case, the Act of May 23, 1887, does not apply because no right of the deceased to the subject in controversy had passed, either by his act or by the act of the law to the plaintiff. The deceased never had any right to the benefit which was to be paid exclusively to his wife."

The Act of 15 April, 1869, P. L. 30, had provided: "That no interest or policy of law shall exclude a party or person from being a witness in any civil proceeding." Certain exceptions were then specified, among them, the following: "And this act shall not apply to actions by or against executors, administrators or guardians, nor where the assignor of the thing or contract in action may be dead," etc. In the case of Mann *vs.* Weiand, 81½ Pa. 243, a widow of a decedent brought an action under the acts of 1851 and 1855 to recover damages for the death of her husband, occasioned by the defendant's knowingly keeping a ferocious dog which had attacked decedent's team, causing it to run off and overset the wagon, with the result that plaintiff's husband was killed. The defendant was allowed to testify at the trial and his competency as a witness was one of the questions considered in the appeal. After quoting the terms of the Act of 1869, which was then in force, Justice Mercur, speaking for the Court, said: "This action is not by or against an executor or guardian; nor is the assignor of the thing in action dead. There is no assignment, either actually or constructively. If an action had been brought by Weiand to recover damages for injuries he had sustained, it would have survived to his personal representatives under the eighteenth section of the act of April, 1851, supra; and after his death the plaintiff in error

would not have been competent to testify to matters which occurred during the life of Weiand. This action, however, was not brought by him, nor is it for the recovery of damages for injuries he sustained; but it is for injuries his wife sustained by his death. It is for a cause of action her husband never had. It arose on and after his death, and accrued to his widow. In case of injury causing death, the first section of the Act of April 26th, 1855, Pur. Dig. 1094 pl. 3, withholds the right of action from the personal representatives of the decedent, and gives it only to the husband, widow, children or parents of the deceased. The present right of action never existed in favor of Weiand, nor during his life did it exist against the plaintiff in error. When the law created this right of action against the plaintiff in error, it gave it to the defendant in error. It is true the death of her husband was an act precedent to her right of action; but so was the negligence of the plaintiff in error. The two united enacted the cause of action and gave it to the widow. It had no existence prior to that time. It originated between two living persons. Each is now a party to this action. The learned judge, therefore, erred in not permitting the plaintiff in error to testify and the judgment must be reversed." The right asserted by the widow in this case is precisely the right that was asserted by the widow in that case. That right was bestowed by the act of 1855 which, in an unaltered form is still in force. Although the act of 1869 has been superseded by the act of 1887, yet the latter act attaches disqualification at the same point as the former act did.

Under the 18th section of the act of 1851, when suit was brought by the injured party for the injury he sustained, and he subsequently died, the action survived, and was to be carried on by his legal representatives. In such a case recovery could be had for the injury done to the deceased, including pain and suffering and the value of what would have remained of his life for himself. McCafferty *vs.* Railroad Co., 193 Pa. 339. But if no suit had been brought by deceased in his lifetime for his injuries, a suit could be brought by his widow, (for example), and the measure of damages in such a suit would be entirely different, for she would be allowed to recover her pecuniary loss and the loss sustained by her

children by reason of decedent's death, without any allowance for pain and suffering—and the extent of such recovery would be measured by what he probably would have earned which he would have devoted to the support of his family. Railroad Co. *vs.* Butler, 57 Pa. 335.

The thing sued for in the two cases is different, the measure of damages is different, and the parties to the action are different. When a widow sues, although she sues in consequence of an injury that befell her husband, yet only because death has resulted therefrom and entailed on herself and her children injurious consequences affecting them personally. When the widow sues, she sues in her own right, a right bestowed solely by the act of assembly. When the husband sued in his lifetime, he would sue in his own right, and it could survive and be continued only in his right after his death. The interest which renders a witness incompetent in the case last mentioned is an interest which shall "be adverse to the said right of such deceased party;" but, when the widow sues after the death, she sues for the vindication of a right bestowed on her personally, and the adverseness of the interest of the witness to that right, does not disqualify, for the person possessed of that right is in full life, and may fully speak for the vindication of the right. Therefore, assuming the adverseness of the interest of the witness to the right sought to be vindicated in this suit, yet that litigation right is not the right "of such deceased party," and therefore it does not render the witness incompetent.

The constitutional provision, (section 21, article 3), does not give to the acts of 1851 and 1855 a significance they did not have before. Notwithstanding the cases cited by plaintiff's counsel, and notwithstanding the difference in the phraseology of the acts of 1869 and 1887, we think the essential nature of the litigated right is such as to make the ruling on the question of competency, as found in Mann *vs.* Weiand, 81½ Pa. 243, the appropriate one to be made here. The witness was offered to sustain a material issue in the case, and should have been heard, and the refusal to hear him was error.

The rule for a new trial is made absolute.

IN RE: ESTATE OF HENRY S. WARREN, DEC.

Wills—Construction—Testamentary Trustee—Powers—Conversion.

A will provided, inter alia, as follows: "To my wife, A, I give the use of all my property, both personal and real, but so long as she shall remain a widow, and at her marriage or decease, I direct that all my said property be taken charge of by my executors, and by them kept for my grandchildren, the children of my sons, B and C," etc. The testator named his sons B and C as executors. After the death of A, on petition for inquest of partition of the property in question, it was HELD, awarding the inquest, that

(1) The testator gave to the specified grandchildren a vested interest in the whole estate to take effect in possession upon the marriage or decease of A; (2) The provision taken as a whole created no trust in the executors, other than in an administrative direction, which, under the circumstances of the present case, is no longer necessary for the purpose of the grant; (3) The executors were given no power as trustees to convert the property into personalty for distribution.

In ascertaining a testator's intention, the fact that the will contains no limitations over after a devise in remainder, is to be weighed in support of the construction that he meant to pass a fee.

In order that a trust may arise from the words used in a will, the Court must be satisfied, from the words themselves, taken in connection with the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled and sure as though he had given the property to hold upon a trust disclosed in the ordinary manner.

If the will of a testator contains no positive direction or expressed purpose that his real estate be sold and the proceeds distributed as money, or discloses no clear intention to that effect, converson should not be decreed unless there is absolute necessity to sell in order to execute the provisions of the will.

The blending of real and personal estate by a testator in his will is not of much significance unless it clearly appears that he intended thereby to create a fund raised out of both the real and personal estate, and bequeath the said fund as money.

Petition for inquest of partition. In the Orphans' Court of Lackawanna County. No. 770, Series C.

A. A. Vosburg, for Petitioner.
W. W. Baylor, for Executor.
M. W. Stephens, for Respondents.

Sando, P. J., July 12, 1912—The will of Henry S. Warren, upon the correct interpretation of which depends the question whether the petitioner is entitled to an inquest of partition at the present time, is evidently the production of a man without legal counsel and little ability of his own to express the intentions which he had formed. Dated May 9, 1887, and probated February 27,

1900, it contains inter alia: "To my wife, Sally Ann Warren, I give the use of my property, both personal and real, but so long as she shall remain a widow, and at her marriage or decease, I direct that all my said property be taken charge of by my executors, and by them kept for my grandchildren, the children of my sons, George W. Warren and William H. Warren * * * " The testator names his two sons, George W. Warren and William H. Warren as executors.

While the will is obscurely and ambiguously drawn, yet it is apparent, taking the whole will together, that the testator intended to dispose of his entire estate; giving to his widow a life estate, and, by the limitations of the will the grandchildren a vested interest in the whole estate which was to take effect in possession, upon the marriage or decease of Sally Ann Warren.

Words which manifest an intention on the part of the testator to dispose of his entire estate, are to be treated as favoring the construction that he meant to pass a fee; Geyer *vs.* Wetzel 68 Pa., 84. And, when a will contains no limitations over after a devise in remainder, that fact is to be weighed in support of the same construction in ascertaining the testator's intention: Ogden's Appeal, 70 Pa., 504.

Sally Ann Warren is now dead. At the time of her death, there were living, the petitioner, a son, and Margaret Warren, a daughter, eighteen years of age, children of George W. Warren, and Belle Warren, of legal age, a daughter of William H. Warren. In these proceedings there was no suggestion that any person other than the parties named were or could be interested.

It is contended for the respondents that under the terms of the will, partition cannot be demanded for the following reasons: (a) That the executors are entitled to the property and use of the same, after the decease of Sally Ann Warren, for the terms of their natural lives; (b) that the executors are trustees of all the property, real and personal; and, (c) that all the property has been converted into personalty in the hands of the executors as trustees for distribution.

While the wording of the will is not clear yet, from its general construction, it does not appear that a trust was created as is here contended for and urged. We can

not find in a not more than an administrative direction, any trust for the use of the executors, the sons of the testator.

To determine whether there is a trust we are to look at the powers and duties conferred. In order that a trust may arise from the words used, the Court must be satisfied, from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as full, complete, settled, and sure as though he had given the property to hold upon a trust disclosed in the ordinary manner. Three things must concur to raise a trust. Sufficient words to create it, a definite subject, and a certain or ascertained object; and to these requisites may be added another, viz.: that the terms of the trust should be sufficiently disclosed: Eschenbach's Estate, 197 Pa., 153.

The purpose of the testator to be gathered from the provisions of the will, was to give his estate absolutely "to his grandchildren, the children" of his sons at the "marriage or decease" of Sally Ann Warren."

If a trust was created, the dominion of the trustees is no longer necessary to accomplish the purposes of the grant. "A trust is passive where the trustee has no duty to perform, or when the trust serves no purpose, or none that would not be equally served without it:" Owen *vs.* Naughton, 23 Pa. Super. Ct., 640.

The third question presented is, as to conversion, which is determined according to the intention of the testator, and if not expressly mentioned, must of course be derived from the general effect of the will. The contention is that there was a conversion worked by the will of the testator.

In Hunt's Appeal, 105 Pa., 141, the requisites to effect conversion are stated as follows: "It ought to be settled by this time that in order to work conversion there must be either (1) a positive direction to sell, or (2) an absolute necessity to sell, or (3) such a blending of real and personal estate by the testator in his will as clearly shows that he intended to create a fund out of both real and personal estate, and to bequeath such fund as money."

In this will there is no direction to sell, but the rules applied in the construction of this power may aid in

applying the facts of the case to other modes of working conversion. In Anewalt's Appeal, 42 Pa., 414, the Court says: "To establish a conversion the will must direct it absolutely or out and out, irrespective of all contingencies." There must be an imperative direction to sell. If therefore the direction to convert must be positive and imperative, in the absence of such direction, conversion should not be decreed unless the intention is clear or the necessity absolute.

In Lindley's Appeal, 102 Pa., 235, Mr. Justice Paxson said: "The blending of real and personal estate by a testator in his will is not of much significance unless it clearly appears that he intended thereby to create a fund raised out of both real and personal estate and bequeath said fund as money." It therefore requires some clear intention to so blend and convert, and this ought to be as distinct and positive as is required in an express direction to sell.

In the testator's will there is no power to sell, and nothing in the language used which indicates a purpose to create a fund and bequeath it as money. As there was no positive direction and no expresssed purpose to sell the real estate and distribute the fund realized as money, conversion in this case must depend upon the necessity to sell to execute the provisions of the will. Such necessity must be absolute. It must arise out of the scheme of the will and not in administration. In the provisions of the testator's will we do not find any necessity for conversion. We find therefore as matter of law that there was no conversion under the will of the testator.

After a careful consideration of this matter, we are of the opinion that the petition for an inquest of partition should be granted.

And now, July 12, 1912, inquest is awarded as prayed for; notice to be given to the parties as directed by law. Returnable to the first day of next term.

CENTRAL R. R. CO. OF N. J. *vs.* MAUSER & CRESSMAN.

Interstate Commerce Act—Freight Charges Less Than Published Rates—Suit to Recover Difference.

A railroad company transported over its lines merchandise, and delivered the same in New York at a lower rate than the published rate under the Interstate Commerce Act. The freight charges were paid as demanded and the merchandise delivered. Thereafter, on suit by railroad company to recover the difference between the legal published rate and the contract rate, it was held that the plaintiff could recover.

In the Court of Common Pleas of Lehigh County. Central Railroad Company of New Jersey *vs.* Frank B. Mauser and Allen H. Cressman, partners trading as Mauser & Cressman. No. 92 September Term, 1911. Assumpsit. Jury Trial Waived.

Frank Jacobs and Charles E. Miller, for Plaintiff.
Edward Harvey, for Defendants.

Trexler, P. J., July 17, 1912.

FINDING OF FACTS.

The Court finds the following facts:

First. The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of New Jersey and under due authority of law operates a steam railroad within the States of Pennsylvania and New Jersey, and is and was at the times mentioned in plaintiff's statement filed in the above stated case a common carrier of property and passengers partly by railroad and partly by water. (Requested by plaintiff).

Second. The defendants are citizens of the State of Pennsylvania and are and were at the times mentioned in plaintiff's statement engaged in the business, amongst other things, of shipping, receiving, milling and otherwise dealing in grain and grain products in the Borough of Catasauqua, County of Lehigh, and State of Pennsylvania. (Requested by plaintiff.)

Third. The plaintiff in carrying on its business of transporting property and passengers as a common carrier transports the same between the various points on its own route lying between the City of New York, State of New York, and the City of Scranton, State of Pennsyl-

vania, and between divers places between said termini, and as well under arrangements for continuous carriage, transports property delivered to it by other common carriers whose routes form connections with the route of the plaintiff, or whose routes form parts of through routes from points of origin to points of destination on the route of this plaintiff. (Requested by plaintiff.)

Fourth. On the respective dates mentioned in plaintiff's statement, the plaintiff and carriers whose lines made up the through routes from points of origin to points of destination shown as aforesaid, tranported for the defendants at their request grain or grain products. Each shipment so shown as aforesaid was milled in transit by the defendants. (Requested by plaintiff.)

Fifth. The common carriers which transported said property had prior to said transportation filed with the Interstate Commerce Commission, and printed and kept open for public inspection, schedules showing the through rate for transporting shipments of grain or grain products from the points of origin, shown as aforesaid, to Jersey City, New Jersey, a point on the line of the plaintiff intermediate to the points of destination above mentioned, and plaintiff filed with the aforesaid Commission its schedules of charges for moving grain and grain products from Jersey City, New Jersey, to said points of destination and also filed with said Commission its schedules of charges for according the privilege of milling grain or grain products in transit.

At the time said shipments moved there was no through rate from the points of origin to the points of destination. The only schedules of charges filed with the Commission were the joint schedules of charges to Jersey City, New Jersey, and the schedules from Jersey City to points of destination. (Requested by plaintiff.)

Sixth. In each shipment mentioned in plaintiff's statement the bill of lading showed the shipper at the point of origin as consignor and himself as consignee and upon the production of the bill of lading to plaintiff's agent at Catasauqua, Penna., the shipment was delivered to defendants, who at no time paid any charges at Catasauqua for transportation or for the privilege of milling in transit. In the exercise of said privilege of milling in transit the defendants delivered to the plaintiff at Cata-

sauqua a quantity of flour equal in weight to a given delivery of grain to them at the same place and in each shipment said flour was consigned by the defendants to themselves as consignees with a draft attached to the bill of lading against the purchaser of the flour at the point of destination and said purchaser of the flour paid the freight charges from the respective point of origin through to point of delivery including the charge for the privilege of milling in transit at Caasauqua. (Requested by plaintiff.)

Seventh. The total amount of charges at the rate published according to said Act of Congress for transporting all the shipments mentioned in plaintiff's statement including the charge for the privilege of milling in transit, from the points of origin to Jersey City is $11,212.81 which amount has been paid to plaintiffs. The total amount of charges at the rate published as aforesaid for transporting said shipments, including the charge for the privilege of milling in transit, from the points or origin to the points of destination beyond Jersey City shown on plaintiff's statement, is $13,365.48, or a difference of $2,152.67, which amount has not been paid to plaintiff. (Requested by plaintiff.)

Eighth. All the freights, for which charges are made, were accepted by the plaintiff at Buffalo in the State of New York, or other points further West, and the grain shipped was, in each case, consigned to the shipper and was delivered at Catasauqua, Penna., for milling. (Requested by defendants.)

Ninth. All of the consignments of grain came to the plaintiff, through contract agreements or understanding with transportation companies at Buffalo or west of that point, and they were delivered to and accepted by the plaintiff at a fixed designate rate from the point of origin to New York City. (Requested by defendants.)

Tenth. The grain transported was accepted in each case by the plaintiff at fixed rates or charges agreed upon between the shipper and the plaintiff, and the freight charged was from the point of origin to New York City. (Requested by defendants.)

Eleventh. Under a rule or regulation and with an understanding between the parties, the grain delivered to the defendants was to be milled at their mills in Cata-

sauqua and the flour was to be shipped on the road of the plaintiff to New York for delivery. This is called "Milling in transit." When the flour was shipped the original freight charges from Buffalo to New York City, together with an extra charge for shifting, were in each case given by the plaintiff to the defendant. A bill of lading for the flour was made out and draft attached. Upon the payment of all freight charges by the party receiving the flour and the payment of the draft, the plaintiff delivered the flour to the person holding the paid draft. (Requested by defendants.)

The defendants requested the finding of the following facts, which the Court refuses:

First. The freight charges were to be paid by the shipper, who in each instance, was the consignee of the grain, and a bill of lading was drawn by the shipper with draft attached. The draft in each case was paid by the defendants, who obtained the bill of lading but no freight was paid by the defendants.

Second. Each consignment was accompanied by a way-bill which is in the custody of the plaintiff, and it is a matter of inference that each car load of grain was billed at the point of origin to New York City.

Third. According to the rules and regulation of the plaintiff, no freight charges were to be paid by the defendants unless settlement was not made within three months from the delivery of grain at the defendant's mills. All freight charges due and owing the plaintiff at the point of delivery, to wit: New York City, were to be paid by the person or persons holding the drafts. The defendants were not to pay the original freight charges or any charges except three dollars for shifting cars.

Refused. This request describes the course of dealing. There is no evidence that it was according to the rules and regulations of the plaintiff.

The Court finds the following conclusions of law:

First. The transporting of the grain and grain products on the respective dates and between the points of origin and points of destination and of the weight and quantity shown in plaintiff's statement was subject to the provisions of the Act of Congress of the United States entitled "An Act to Regulate Commerce," which act was approved on the 4th day of February, 1887, and the acts

supplementary thereto and amendatory thereof. (Requested by plaintiff.)

Second. The only legal rates for transporting said shipments of grain and grain products between the respective points of origin and the respective points of destination set forth in plaintiff's statement are the rates shown in said statement between the respective points of origin to Jersey City plus the charge for milling in transit and lighterage to points of destination beyond Jersey City named in plaintiff's statement and which rates and charges were shown in the schedules filed with the Commission created by said act "An Act to Regulate Commerce" and printed and kept open to public inspection and the plaintiff could not charge or demand or collect or receive a greater or less or different compensation for such transportation than said rates and charges. (Requested by plaintiff.)

Third. It is the duty of the plaintiff as the line making delivery of the property to collect the established schedule rates and this is true notwithstanding that the respective bills of lading may have named a lower rate. (Requested by plaintiff.)

Fourth. The defendants are liable for the charges to transport said grain and grain products from the several points of origin to the several points of destination where delivery was in fact made notwithstanding that plaintiff has been paid for such transportation to Jersey City en route to the several points of delivery. (Requested by plaintiff.)

Fifth. Whether the defendants be held to have been consignors or consignees they are liable to the plaintiff for the charges of transportation. (Requested by plaintiff.)

Sixth. The defendants are presumed to have known of the existence of the schedules of rates and the necessity of compliance therewith, and are to be held to have contracted with reference to the rates fixed by the schedules, regardless of the terms of any contract between the plaintiff and the defendants. (Requested by plaintiff.)

Seventh. Notwithstanding the plaintiff has collected freight charges at rates less than those fixed by the Interstate Commerce Commission schedules, under mistake of

fact, it may recover from the defendants the full amount of freight charges. (Requested by plaintiff.)

Eighth. The defendants were entitled to the privilege of milling in transit, which is defined to be the transforming of grain into flour while en route from the point or origin to the point of final destination, and for such privilege the defendants are required to pay the legal charges mentioned in plaintiff's statement. (Requested by plaintiff.)

Ninth. Any contract, agreement, arrangement or device, the effect of which was to vary the amount to be charged for transportation from the amounts fixed by the schedules of charges filed with the Interstate Commerce Commission is null and void. (Requested by plaintiff.)

Tenth. Judgment should be entered in favor of the plaintiff and against the defendants for the sum of $2,152.67. (Requested by plaintiff.)

The defendants have requested the Court to find the following conclusions of law:

1. Under the law and the evidence, the verdict must be for the defendants.

Refused.

2. No contract relation has been shown to exist between the plaintiff and defendant that would sustain an action as assumpsit.

Refused.

3. Freight on each shipment of grain and flour was settled and paid for, the contract became executed, and no action can be sustained under the facts.

Refused.

4. Each shipment of flour, according to the uncontradicted evidence, was settled and paid for as charged by the plaintiff. The money for freight charges was paid the plaintiff in each instance and thereby the contract was executed.

Refused.

5. The plaintiff having accepted grain at the point of origin billed for delivery in New York at a fixed and specified freight charge, and having accepted from the defendants flour for delivery at the same point and under the original contract with the first shipper, in law the flour was but a substitute for the grain under the custom of "Milling in transit," and was delivered to the plain-

tiff and accepted by it under the original rates agreed upon between the plaintiff and the shipper with an extra charge of three dollars for shifting.

Refused.

6. The freight charges from the point of origin to New York City having been paid and agreed upon between the plaintiff and the shipper, the various carloads of grain were delivered by the plaintiff to the defendants without making any charges for freight. When the flour was ready to be substituted for the grain, the total freight charges were given in each instance by the plaintiff to the defendants, and the flour was billed at a price based on the correctness of these freight charges. The freight charges were collected at the point of delivery in New York City by the plaintiff from the parties holding drafts for the flour. The plaintiff is estopped from re-opening the executed contracts and making a charge against the defendants.

Refused.

7. It would be inequitable to cast the burden of any extra charge on the defendants, when they were not the original shippers and were in no way a party to any contract for delivery of freight between the point of origin and New York City.

Refused.

8. There is no evidence that the defendants in any way attempted to evade the provisions of the Inter-State Commerce Act. They shipped flour under the "Milling in transit" rule, and all freights claimed by the plaintiff were paid to it at the point of delivery. As the defendants were not parties to any evasion of the Federal Act, if there was an evasion, and in no way contributed to the charges of freight, if any loss was sustained it must be borne by the party who caused it and not by an innocent party.

Refused.

9. There is no evidence of mistake that would justify the opening of executed contracts.

Refused.

OPINION.

The plaintiff transported over its line with milling privileges in transit certain grain, delivered the same in New York City at a lower rate than the published rates

under the Inter State Commerce Act. The terminal of the Central Railroad of New Jersey is Jersey City, and instead of receiving the Jersey City rate plus lighterage charge to New York the latter charge was omitted, and the goods were delivered to New York City points at the Jersey City rate. The freight was paid as demanded. The present suit by the railroad company is to recover the difference between the rates actually charged and the rates which should have been charged and which were filed with the commission. The difference between the two rates is the lighterage charge between Jersey City and New York points.

There is no doubt that the law requires that the only rate chargeable shall be the established rate, and that this rate is binding upon the carrier and all parties concerned as the only charge, whether they have knowledge of it or not. The parties are presumed to know the schedule and the necessity of compliance therewith and may be thought to have contracted with reference to the rates fixed by the schedules regardless of the terms of the contract. When the rates in the bill of lading differ from those in the published schedule the latter prevail and bind the transaction. Gulf Colorado, etc. Railway *vs.* Hafely, 158 U. S. 98; Texas and Pacific Railway Co. against Mugg, 202 U. S. 242. A contract different from the filed rate is void. Texas and Pacific Railway *vs.* Abilene Cotton Oil Co., 204 U. S. 426 (445).

We need not further discuss this aspect of the case. The legal rate which should have been charged was the rate to Jersey City plus the lighterage charge from Jersey City to New York City or New York points.

The defendants contend that although the rate was not the correct rate as set forth in the schedules filed, that the contract being executed and the transaction definitely concluded no action lies. To this proposition I can not assent. It would afford an easy method of getting around the provisions of the Act, and there is only one way to close the contract of carriage, and that is to pay the fixed rate. The consideration does not pass until the full amount is paid. As noted above the published rate is the consideration of the contract irrespective of any other rate fixed by the parties. Gulf Colorado, etc., Railway *vs.* Hafely, 158 U. S. 98. The only consistent way to

enforce the Act is to confine shippers and carriers alike to the schedule rates. To allow departure from that by indirect ways would soon afford the unscrupulous a ready means of violating the Act with impunity. The chief purpose of the Act is to secure uniformity of treatment to all, to suppress unjust discrimination and undue preference, and to prevent special and secret agreements with respect to rates in the interest of transporters, and to put them under and require such rates to be established, in a manner calculated to give publicity and make them inflexible while in force, and to cause them to be unalterably safe in the mode prescribed. Kansas City Southern Railway Co. *vs.* C. H. Albers Co., 18 Oct. T. 1911, S. C. U. S. February, 1912. As long as, therefore, any part of the legal rate remains unpaid the railway company has a right of action for the balance due.

But it is urged by the defendants that there was no contractual relation existing between the parties, and that assumpsit does not lie. The course of dealing was as follows. The shipper, that is, the party who sold the grain, consigned the grain to himself and sent the original bill of lading to the Bank of Catasauqua with draft attached. The defendants went to the bank, honored the draft, obtained the bill of lading, presented it to the railroad company, who delivered the grain, freight unpaid, to the defendants' mill where it was transformed into flour or "Milled in transit," and within 90 days the flour produced from the grain, or its equivalent in weight, was delivered to the railroad company by the defendants to be consigned to themselves in New York or some point having a New York rate. The defendants obtained a new bill of lading from the railroad company at Catasauqua, covering the delivery at New York and attached a draft, sent it to the bank, where the customer in New York who had contracted for the flour paid the draft, obtained the bill of lading and presented it to the railroad company, paid all the freight from the point of origin to the point of destination.

In fixing the liability of defendants for the freight unpaid we must inquire into the relations of the parties as they really were. When the cars arrived at Catasauqua the defendants paid for the same and became the owners of the grain. When they shipped its equivalent

in flour they still retained their ownership, the flour being consigned, not to the purchaser, but to themselves. The purchaser became the owner when he paid the draft and obtained the bill of lading. The goods being transported from Catasauqua to New York for the defendants they were liable for the freight. It was their goods which was being hauled. It was their goods that were lightered. If any loss had occurred between Catasauqua and New York it would have fallen on them and they would have been the only parties to have recovered against the railroad company.

It appears that the real arrangements looking to the transfer of the grain and flour were made by the defendants with the Central Railroad Company. (Notes of testimony, Page 13.) For some reason, not explained on the record, the grain intended for Catasauqua was billed to Chapman's Quarries, a point that had a New York rate, and the load stopped off at Catasauqua. The defendants appear to have had control of said shipment. Why the fictitious point of consignment was had we need not inquire. Holding the above views I must enter judgment for plaintiff for the amount claimed.

Now July 17, 1912, if no exceptions are filed within thirty days after service of notice as required by the Act of 22d April, 1874, p. 109, judgment shall be entered by the prothonotary for the sum of $2,152.67 in favor of the plaintiff.

On exceptions, the Court (Trexler, P. J.) filed the following opinion, January 6, 1913:

The first exception is, the defendant is a corporation chartered and organized under the laws of Pennsylvania, and the action is against the corporation and not against the individuals. The record papers disclose the fact that the defendants were sued as Frank B. Mauser and Allen H. Cressman, trading as Mauser and Cressman, and that the counsel for defendant entered his appearance for them trading as above, and the affidavit of defense recognizes the partnership.

There are twenty exceptions filed to the finding of facts and conclusions of law. I need not refer to them in detail. On the argument particular stress was laid upon the allegation that there was no contractual relation

between the parties, and that the plaintiff is estopped. As to the first, I can add nothing to what I have already said.

As to the theory invoked by the defendants, I can not see its applicability. Both parties to this contract of carriage knew the legal rates, or, what is equivalent to knowledge, were presumed to have knowledge of them. In fact, as to the rates to be charged, their contract was made for them by the Act of Congress, and they had no power to make it otherwise. When the rates were approved by the Inter State Commerce Commission, the power of the parties to contract in regard thereto ceased.

How could one party be blamable in this regard, and the other be innocent? It was the duty of the railroad company to collect the legal rates, and it was also the duty of the customer to pay the legal charges. No silence or neglect of the company can be urged as an answer for the failure to comply with the Act of Congress.

Now, January 6th, 1913, all the exceptions, being numbered from 1 to 20 inclusive, are dismissed, and the prothonotary is directed to enter judgment in favor of the plaintiff and against the defendants according to the decision heretofore filed.

MILLS *vs.* ALLENTOWN ELECTRIC LIGHT AND POWER COMPANY.

Negligence—Contributory Negligence—Electric Light Companies.

In an action by the widow of an employee of an electric light company, engaged in changing circuits of arc lights, to recover damages for the death of the employee, caused by coming in contact with a wire of high voltage, plaintiff's decedent was guilty of contributory negligence, and there can be no recovery, where it appears that the employee assumed the risk of his employment, and that he neglected to use rubber gloves provided for him.

In the Court of Common Pleas of Lehigh County. Minnie L. Mills *vs.* Allentown Electric Light and Power Company. No. 88 April Term, 1911. Motion to take off Compulsory Non-suit.

James L. Schaadt and U. S. Koons, for Plaintiff.
R. J. Butz and A. G. Dewalt, for Defendant.

Heydt, P. J. 56th Judicial District, specially presiding, December 27, 1912. James H. Mills, the plaintiff's decedent, was a lineman of the defendant company.

On July 27, 1910, while engaged in changing circuits of arc lights on one of defendant's poles located at the southwest corner of Tenth and Hamilton streets, in the City of Allentown, he came in contact with high tension wires and was killed. At the trial the court entered a compulsory non-suit for the following reasons:

First, because the plaintiff's decedent was guilty of contributory negligence.

Second, because the plaintiff failed to prove any negligence on the part of the defendant which was the proximate cause of the accident.

Third, because the plaintiff's decedent was killed by coming in contact with live wires carrying a high voltage, with which he was familiar, which was one of the usual and ordinary risks incident to his employment, and which he consequently assumed.

We are now moved to take off the non-suit. If any one of these reasons is valid, the motion must be denied.

1. The pole on which the accident occurred was about thirty-five feet high; there were three cross-arms on it extending about northeast and southwest; the top cross-arm was three inches from the top of the pole; the length of the cross-arms is variously given from forty-three inches to eight feet; the second cross-arm was eighteen inches below the top one; and the third cross-arm was eighteen inches below the second one; on the top cross-arm were six pins and six wires, on the second cross-arm were six pins and four wires, the pole pins being empty; on the third cross-arm (from the top) were six pins and two wires, the wires being on the outside pins; about six feet below the lowest cross-arm were three telephone wires fastened to brackets on this pole about six inches apart.

Mr. Mills climbed up the pole steps on the south side of the pole until he came to the lowest cross-arm. He stood on the lowest cross-arm; he was between the wires on the second cross-arm; in attempting to put his safety belt around the pole to hang it to his body belt, he got his shoulder against the primary wire on the second arm, and in trying to reach around the pole he got against the

primary wire with his hands, thus forming a circuit, and then he dropped and was killed. He did not wear rubber gloves. The company had provided rubber gloves, they were in a tool chest on the wagon. Mills knew that these high tension wires were upon this pole and was familiar with their location.

Failure of an employee of an Electric Light Company to use rubber gloves while engaged in work upon high tension electric apparatus is negligence per se and will prevent recovery for injuries received while so engaged: Hart *vs.* Allegheny County Light Company, 201 Pa. 234; Moyer *vs.* Metropolitan Electric Company, 14 D. R. 798, and cases cited.

In the recent case of Griesemer *vs.* Suburban Electric Company, 224 Pa. 328 (1909) the Supreme Court, per Fell, C. J., says at page 332:

"If the deceased had been working with or among highly charged electric wires without the use of gloves negligence could have been imputed to him." That describes this case exactly.

2. The maxim of res ipsa loquitur does not apply. It is incumbent upon the plaintiff to prove affirmatively that the defendant was negligent and that such negligence was the proximate cause of the accident.

The negligence charged is:

(a) That the high tension wires on the pole were too close together. There is some question as to the exact location of the primary wires on this pole, and the distance those wires were from the centre of the pole. But there is no evidence that the location of the wires was the proximate cause of the accident. This question, however, would probably under all the testimony and the authorities have to be submitted to the jury.

(b) That the defendant failed to turn off the current while Mills was at work on this pole. Our attention was not called to any decision in this State, nor do we know of any, which made it the duty of the defendant to turn off the current passing through the primary wires. If the defendant had been ordered to work on these primary wires, more force might attach to this contention. Under the facts we think it is wholly without merit.

3. The plaintiff's decedent assumed the risk of his

employment. Mills was about thirty years old; he had been a lineman for five or six years; he had the reputation of being a skilled workman and prided himself upon the fact. On July 27, 1910, the day of the accident, Metzgar, the foreman of the gang, gave Mills orders to go up this pole and cut around some arc circuit wires. Mills went on this pole and completed the work, as he thought, which had been assigned to him. The foreman called his attention to the fact that he had forgotten to close his circuits. Mills went back on the pole and a short time afterwards met with the accident. If Mills had done his work properly the first time, there would have been no occasion for him to go up the second time.

Mills knew the primary wires were on this pole and their location. He knew the dangers incident to working on this pole. Before going upon this pole he said he hated the telephone wires. Metzgar warned Mills before he went upon this pole the second time to be very careful and that he should not crawl up into the primary wires, that it was dangerous.

Under these facts we are of opinion that the plaintiff's decedent assumed the risks naturally and reasonably incident to his employment. He was perfectly acquainted with the conditions existing on the pole. He knew the dangerous character of the work in which he was engaged. He voluntarily engaged in it:

Diehl *vs.* Iron Co., 140 Pa. 487, and cases cited.

Where a workman employed by a telephone company is injured by coming in contact with an electric light wire, attached to a pole on which he is working, and he was aware of the danger connected with such wires, the risk is one which is assumed and he cannot recover: Moyer *vs.* Co., 4 Lehigh County Law Journal, 268.

Upon all reason and authority he was bound by the consequences of his own act and cannot recover.

Plaintiff's decedent had been warned by the foreman to be careful about the wires.

This was evidence of contributory negligence in the plaintiff, and that he assumed the risk: Lehigh Valley Coal Co. *vs.* Jones, 86 Pa. 432.

"While electric companies are bound to use the highest degree of care practicable to avoid injury to

everyone who may be in lawful proximity to their wires, yet the ordinary person is held to know that danger attends contact with electric wires, and it is his duty to avoid them so far as he may. If one heedlessly brings himself in contact with such wire, and is injured in consequence, his imprudence must be regarded as a contributory cause and will prevent a recovery:" Haertel *vs.* Penna. L. & P. Co., 219 Pa. 640 (1908).

"It is the duty of a plaintiff seeking to recover, when the gravemen of the action is the alleged negligence of the defendant, to show a case clear of contributory negligence on his part. In other words, he must establish a prima facie cause of action resulting exclusively from the negligence and wrong of the defendant, before the latter need answer at all:" Waters *vs.* Wing, 59 Pa. 211.

What Mr. Justice Stewart speaking for the Supreme Court says in Lee *vs.* Dobson, 217 Pa. 349 (1907) at page 352, is fully applicable to the case at bar: "There is no uncertainty in the law applicable to cases of this kind. The master is not an insurer of the servant's safety. While he is required to furnish reasonably suitable and safe means with which to carry on his business, yet the servant will be deemed to have assumed all risks naturally and reasonably incident to his employment; and to have notice of all risks which to a person of his experience and understanding are or ought to be open and obvious. When one undertakes a perilous employment by operating a machine obviously wanting in suitable appliances for safety, knowingly and voluntarily, he cannot afterwards complain in case of injury in consequence thereof that the machinery was of a dangerous kind, and that it was wanting in appliances reasonably necessary to render it safe. * * * In the light of the evidence the plaintiff's employment was a specially dangerous one, and for this the plaintiff engaged with full appreciation of the risk. Having voluntarily and knowingly assumed the risk, now that he has suffered in consequence, he can have no recourse upon his employer."

From the foregoing discussion we conclude that plaintiff's decedent was guilty of contributory negli-

gence, that he assumed the risk of his employment and that the compulsory non-suit was properly entered.

Now, December 26, 1912, the motion to take off the non-suit is refused.

Eo die, to this action of the Court in this respect an exception is noted for the plaintiff and a bill sealed.

FRICK *vs.* LEHIGH VALLEY TRANSIT CO.

Verdict—Weight of Evidence—New Trial.

While the Court is very reluctant to interfere with a verdict of a jury based on facts, still, where the verdict is so clearly against the great weight of the evidence, a new trial will be granted.

In the Court of Common Pleas of Lehigh County. No. 18 September Term, 1911. Eliza Frick and William R. Frick *vs.* The Lehigh Valley Transit Company. Trespass. Rules for Judgment, n. o. v., and a New Trial.

Allen W. Hagenbach, for Plaintiffs.
Arthur G. Dewalt, for Defendant.

Heydt, P. J. 56th Judicial District, specially presiding, November 13, 1912. Upon the argument it was admitted that the court could not have directed a verdict for the defendant under the evidence at the time of the trial, from which it follows that the court could not now enter judgment n. o. v. and therefore the rule for judgment n. o. v. must be discharged.

The rule for a new trial is pressed only for the reason that the verdict is against the weight of the evidence.

On March 26, 1911, Eliza Frick, one of the plaintiffs, left her home in Allentown and accompanied by her daughter, Helen, about nine years old, went on a visit to Catasauqua. About 9 P. M. she came to Pine and Front streets to take one of defendant's trolley cars to return home. What happened according to Mrs. Frick's testimony is, that when the car stopped, she attempted to get on and got as far as the edge of the platform, then the conductor rang the bell and started the car, then she hollered "my little girl is not on" and that by reason of

the sudden starting of the car she was thrown from the car and sustained the injuries, to recover damages for which this suit is brought.

What happened according to the testimony of the defendant's witnesses is that Mrs. Frick was safely on this car and the car was started in the usual way, that she discovered her little girl was not on the car, that she either jumped off or was thrown off the car while the car was in motion; that the conductor tried to prevent her from jumping or getting off the moving car and told her he would stop the car, but that he could not prevent her from getting off.

The plaintiff's testimony, if believed, warrants her recovery. Her testimony, however stands alone and is not corroborated in respect to any essential fact. On the other hand five witnesses, all of them intelligent and disinterested, all with a favorable opportunity for knowing, testify to a state of facts which, if believed, would compel a verdict for the defendant.

The question now before the court is whether the preponderance of the evidence is so great in defendant's favor as to move the court, to set aside the verdict. No benefit could be obtained from a citation of authorities or a discussion of the law.

In the case of Holden *vs.* Penna. R. R. Co., 169 Pa. 1 (1895) which may be considered a leading case on this subject, Mr. Justice Green speaking for the Supreme Court, said, at page 17:

"The second verdict was manifestly against the law and the evidence, and should have been promptly set aside by the learned court below. When juries are so palpably regardless of their duty, and of the sanctity of their oaths, that they permit their verdicts to be rendered in obedience to their prejudices or their sympathies, as is too often the case, the trial courts should deal with them in a firm and decisive manner and should reject their erroneous verdicts without the least hesitation or delay. Otherwise the administration of justice is brought into public contempt and dishonor."

While the Court is very reluctant to interfere with the verdict of a jury based upon facts. the ascertaining of which was exclusively within its power; and while we cannot, (or at least will not), say that the verdict in the

present case is a perverse one, we feel that the verdict is so clearly against the great weight of the evidence, that another jury should be given an opportunity to verify the correctness of the verdict before it be allowed to stand.

Now November 13, 1912, the rule for judgment n. o. v. is discharged; the rule for a new trial is made absolute; the verdict is set aside, and a new trial granted.

Eo die, exception noted to the plaintiff and to the defendant to the foregoing action of the court, and to each a bill is sealed.

ROLLAND *vs.* COHEN.

Landlord and Tenant—Lease—Construction—Lease of Storeroom—Right of Lessee to Erect Show Case Against Front of Building.

A lease will be construed in the light of the situation at the time and as applied to the subject matter concerning which the parties were dealing.

The owner of a realty may divide it up by leases in any way he sees fit.

The owner of a building leased part of it to the defendant as a storeroom and put in a front whose design visibly included the whole front extending to the outer wall of a partition which separated the storeroom from a hallway which led from the street to back part of the building. Subsequently, the owner leased the said hallway to plaintiff who erected a show case on the front of the building extending over the partition line onto the storeroom front. The lessee of the storeroom tore down the show case and erected one of his own in its place. The plaintiff then filed a bill in equity asking the court to compel the defendant to remove his show case and to restore the plaintiff's. Held, that the plaintiff by his lease acquired no right to use any part of the face of the building for the purpose of placing a show case against it.

"*Partition.*"

In legal contemplation a partition is not a party wall.

Equity.

Equity will not determine a right which a party to the cause has no standing to raise.

Municipal Law—Obstruction of Sidewalk—Equity—General Relief.

Where the erection of a show case against the face of a building does not involve any violation of municipal regulations or amount to an obstruction more injurious than the complainant claims the right to erect in the same place, equity will not grant general relief.

In the Court of Common Pleas of Berks County, in Equity. No. 1077 Equity Docket, 1912. Upon trial and final hearing.

Paul H. Price for Plaintiff.
S. M. Meredith and J. A. Keppelman for defendant.

I. FINDINGS OF FACTS.

Opinion by Endlich, P. J., December 21, 1912.

1. Chas. A. Donahower and Kate D. Stitzel are the owners of a certain building on the north side of Penn street, in the City of Reading, covering numbers 631 and 633. The latter number was given to that portion of the building which consists of a large store-room fronting on and accessible from the street; the former to the remainder of the building accessible from the street through a hall-way to the west of said store-room, separated from the same by a partition, and used by the owners as a dwelling.

2. On January 24, 1907, the owners leased No. 633 to one Dentler, agreeing in the lease to put in a new front in accordance with a design or plan already made, to the cost of which improvement Dentler was to contribute.

3. On March 12, 1907, the owners leased to plaintiff for a period of one year beginning April 1, 1907, certain portions of No. 631, viz., "the hall-way from street to sitting room on first floor, the stairway, parlor and bedchamber in rear of parlor on second floor," with the privilege of renewing the lease at its expiration for two more years,—reserving to the lessors the right to have and use keys to the front door to pass through the hallway to sitting-room on first floor, and to occupy the hallway jointly with the lessee on Sundays. The plaintiff occupied the demised premises as an umbrella manufacturer and seller.

4. In August, 1909, the owners entered into a further agreement with plaintiff promising to make certain understood alterations in the front, to the cost of which he was to contribute, and extending the term of his lease to March 31, 1913, with an option of renewal for two years thereafter,—with the proviso, however, that the latter stipulation should not be binding upon the lessors if before March 31, 1915, they "shall dispose of

said premises." In pursuance of this agreement the hallway was shortly thereafter converted into a store-room, and has since been occupied by plaintiff as such, retaining to the owners the rights reserved in the original lease to plaintiff.

5. On Jan. 12, 1912, the owners leased No. 633, then vacant, to defendant for three years beginning April 1, 1912, on which day he took possession.

6. After the lease of No. 633 to Dentler (Find. of Fact, 2) and before the occupancy of No. 631 by plaintiff (Find. of Fact, 3) the new front stipulated for in the Dentler lease was put in. In connection with and for the purposes of its construction there was erected a pilaster immediately west of the westerly show-window of No. 633 of the height of the first story. Across its face towards the street this pilaster is covered with a wooden facing corresponding with that upon the wall of the building at its eastern extremity and forming part of the store front. The width of the pilaster, east and west, is 9⅞ inches. Its depth, north and south, is about 16 inches. Its easterly side is practically flush with the easterly side of the partition separating No. 631 from No. 633,—that is to say, with the inside westerly wall of the latter store-room. The partition is 4⅜ inches thick. Hence the width of the pilaster extends 5½ inches beyond the westerly side of the partition,—i. e., projects that much beyond the line of the inside easterly wall of the store-room No. 631, and 7 11-16 inches westwardly of the centre of the partition.

7. During Dentler's occupancy of No. 633 and with his express permission (though not with that of the owners of the property) the plaintiff put up and maintained against the pilaster just spoken of an outside show-case 3½ feet high above its base, 16 inches wide and 14 inches deep, set flush with the eastern side of the pilaster and fastened to its facing, for purposes of display and advertisement. When the alterations to the front of No. 631 were made (see Find. of Fact, 4), the show-case was removed by plaintiff, and was not replaced until after defendant had rented No. 633, defendant having, before completion of its replacement, informed plaintiff of the fact that he had leased No. 633 and intended to put up a show-case of his own against the pilaster.

8. Upon plaintiff's refusal to remove his show-case when requested by defendant, as well as by one of the lessors, the defendant one morning at 5 o'clock, in May, 1912, caused it to be taken down, and in its place, put (and has since maintained without objection on the part of the owners) a show-case of his own, corresponding with a similar one at the eastern extremity of the store-front of No. 633, and covering substantially the entire width of the pilaster, about 7 feet in height and 12 inches in depth, with his name marked upon its front and the nature of his business on its sides, displaying in it various articles in which he deals.

9. The presence of the defendant's show-case tends to some extent to hide the entrance to plaintiff's place from persons approaching it from the east, and to divert the attention of passers-by from the plaintiff's store, the entrance to which is immediately west of the pilaster. On the other hand, the right to maintain a show-case against the pilaster would, to the plaintiff, afford a valuable means of calling attention to his place and advertising his business.

10. Neither in the lease to plaintiff, nor in that to defendant, is there any stipulation concerning the erection and maintenance of show-cases on the outside and in front of the premises demised therein.

II. DISCUSSION.

The plaintiff in this bill is asking specifically that defendant be ordered to remove his show-case and restore the plaintiff's, and that he be restrained from thereafter interfering with it. There is also a prayer for general relief. It is manifest there can be no decree in accordance with the specific prayers of the bill, unless the plaintiff is entitled to use the space in front of the pilaster. If he is not so entitled, then the utmost that can be thought of in this case is a decree, under the prayer for general relief requiring the defendant to readjust his show-case or modify the structure of it.

The plaintiff's theory seems to be that one renting for the purposes of his business a portion of a building fronting on a public street, without any stipulation as to outside signs or advertisements, has the right to use the space in front of the portion rented for the display of

his wares and the advertisement of his enterprise according to methods that have become usual, within limits prescribed by municipal regulations, and without undue interference with adjoiners. In support of this contention he cites the decision in Scott *vs.* Optical Co., 21 Pitts. L. J. (N. S.) 368, which seems to be in point. The decisions also referrred to by him in Riddle *vs.* Littlefield, 53 N. H. 503; Lowell *vs.* Strahan, 145 Mass. 1, 12 N. E. 401; Baldwin *vs.* Morgan, 43 Hun (N. Y.) 355, relate only to signs, notices, etc., painted upon or affixed to outside walls, and therefore do not cover this case; whilst that in Hele *vs.* Stewart, 19 W. N. 129, is opposed to all of the foregoing in holding that a party renting a portion of a building rents the inside and not the outside and has no right, without the consent of his landlord, to put out signs in front. In accord with this last decision is that of Judge Thayer in Cunningham *vs.* Entrekin, 15 Pa. C. C. Rep. 183, (a controversy about a show-case) and the doctrine of Pevey *vs.* Skinner, 116 Mass. 129, and of Williams Pa. Law of Landl. & Ten., sec. 461 and 462, that the right in question does not result from the leasing at all, but is a matter of license or privilege depending upon the consent express or implied of the landlord. The question is perhaps one upon which a good deal may be said on either side, accordingly as it is viewed from the standpoint of the interests of a particular tenant, or those of his co-occupants of the building, or those of the landlord. But it is unnecessary in this case to decide it. Accepting for the present the proposition above stated as generally correct, its application here would mean that both plaintiff and defendant have the right to place show-cases outside of their respective store-rooms, each keeping within the space directly in front of the portion of the building leased to him. That this would give the plaintiff no right to cover with a show-case any appreciable portion of the face of the pilaster is too plain for discussion. The idea that his lease gives him all that is west of a straight line running through the centre of the partition between Nos. 631 and 633 and projected southward through the pilaster, cutting 7 11-16 inches of it to his side, is quite untenable. The partition is not a party-wall acccording to any legal understanding of that term: see Roberts *vs.* Bye, 30 Pa. 375; Milne's App., 81 id. 54;

West. Nat. Bank's App. 102 id, 171; Medara *vs.* DuBois, 187 id. 431; Finley *vs.* Stuebing, 38 L. I. 386; Oat *vs.* Middleton, 2 Miles 247, nor obviously is the lease of a room or rooms in a building a lease of a building with the land it occupies. To apply to one thing rules applicable to another fundamentally different from it, on the basis of an analogy between them which is merely apparent and superficial, can only lead to erroneous results. The plaintiff leased the hall-way or store-room bounded on the east by the western side of the partition—i. e., the space between it and the wall opposite,—with the right doubtless to use both for purposes incidental to his business and to insist upon their integrity during the term of his tenancy. Beyond that he took nothing in the partition. It follows that the utmost he can be deemed to have got by his lease, in the way of a right to cover with a show-case the face of the pilaster, would be confined to its most westerly 5½ inches (see Find. of Fact, 6). But to concede him that would be to ignore the circumstances under which his lease was made and his occupation begun and the well-settled principles on the one hand that every contract is to be understood in the light of the situation existing at the time and as applied to the subject-matter concerning which the parties were dealing: Min'g Co. *vs.* Jones, 108 Pa. 55, 66; Doster *vs.* Zinc Co., 140 id. 147, 150; Blakely *vs.* Sousa, 197 id. 305; Wilson *vs.* Wernwag, 217 id. 82,—and on the other hand, that the owner of realty may divide it up in any way he sees fit: Breneiser *vs.* Davis, 134 Pa. 1. The owners of the entire property embracing Nos. 631 and 633 had a perfect right to extend the front of No. 633 beyond the line of the partition between it and No. 631, and correspondingly to narrow the front of the latter. They did so, before leasing to the plaintiff. By putting in a front for No. 633 whose design, symmetry and completeness required it to include, and which in fact included, the whole of the facing of the pilaster, they visibly and in necessary legal contemplation made that entire front a part of No. 633, and that fact was patent and apparently agreeable to plaintiff when he rented No. 631. The right of the lessee of No. 633 to consider and treat the arrangement as making the whole of the front appurtenant to the store-room rented by him could not thereafter be impaired either by the

landlord or by the plaintiff: Snyder *vs.* Hersberg, 11 Phila. 200. Dentler could give it away only for the period of his tenancy. If then, under the authorities relied on by plaintiff there is a right in any one, by virtue of the lease to which he is a party, to put up a show-case against the pilaster, that one must be the defendant and not the plaintiff; whilst, if any one has a standing to deny that right in defendant on the ground of its not being conferred on him by his lease it is the lessors as owners. On familiar principles, the plaintiff, a third party, cannot assert their equities: see Sparhawk *vs.* Ry. Co., 54 Pa. 401; Hill *vs.* Mut. Protect. Co., 59 id. 474, 477. If they do not object, plaintiff cannot: Pevey *vs.* Skinner, 116 Mass. 129.

The existence of a right on plaintiff's part to occupy with a show-case of his own any part of the space occupied by defendant's or to question the title of the latter as between him and his landlords to occupy it being thus eliminated, and the matter of decreeing its entire removal, and a fortiori a restoration of plaintiff's show-case, being thereby put out of the case, the only remaining inquiry is whether the manner in which defendant is exercising what he claims, and what with the consent of the owners must be regarded, as his right is inflicting a substantial and unjustifiable injury upon the plaintiff. The plaintiff himself asserts, and advances as an argument in support of his right to maintain and have reinstalled the show-case removed by defendant, that this is a customary and lawful method of display and advertisement, and his bill declares that the defendant's show-case is similar to that of the plaintiff, which was removed and which he asks to have restored. In the face of these allegations and the fact that defendant's show-case is 2 inches less in depth than plaintiff's, it does not lie in his mouth to object to the defendant's show-case as an improper mode of calling attention to his business and wares, or as of a size and construction calculated unduly to prejudice the business carried on by an adjoiner. It may have the effect of somewhat obscuring the view of plaintiff's entrance and distracting attention from his shop. Such in a greater or less degree is the effect of every structure projecting beyond the building line upon the sidewalk. Where its character is unusual and the

obstruction of view extreme and palpably injurious, as well as in contravention of a plainly expressed or implied right in one party which the other is bound to respect, its maintenance may be enjoined at the instance of the one prejudiced by it: Snyder *vs.* Hersberg, 11 Phila. 200. Yet such cases are exceptional. It must be conceded that within proper limits, for the public convenience, structures of the kind here involved are permitted. Indeed, as pointed out in Livingston *vs.* Wolf, 136 Pa. 519, 533, (and see Act 23 May, 1889, P. L. 274, Art. V, sec 3, xvii,) their regulation is committed to the municipality, whose reasonable decision in such matters by general and uniform ordinances, whilst it may subject some persons to inconvenience or possibly substantial loss, is nevertheless binding upon all the inhabitants, and an act within the boundaries of whose decision thus evidenced is not the subject of an injunction. There is in this case no allegation of a violation on defendant's part of any ordinance of the city of Reading. On the contrary, as already seen, it appears that he is doing no more, but rather less, than what the plaintiff claims to have the right to do in his stead. In these circumstances there is no room for a decree requiring defendant to reduce the dimensions of his show-case or change its position. The only alternative left is to dismiss the bill at the costs of the plaintiff.

III. CONCLUSIONS.

A—The face of the pilaster was by the owners' arrangement of the property visibly and unmistakably made part of the front of No. 633, and the right to its lawful use as such passed by the lease of Jan. 12, 1912, to the defendant.

B—The plaintiff by his lease and subsequent agreement with the owners acquired no right to use any part of the face of the pilaster for the purpose of placing a show-case against it.

C—Whether or not the defendant by his lease acquired a right so to use the pilaster does not arise in this case, since his lessors alone have a standing to raise that question.

D—The use made of the pilaster by the defendant has not been shown to involve any violation of municipal

regulations or any restrainable infringement of plaintiff's rights as lessor and occupant of No. 631.

E—The plaintiff's bill is to be dismissed with costs.

And now, Dec. 21, 1912, the Prothonotary is directed to enter a decree nisi in accordance with the foregoing decision and forthwith to give notice thereof to the parties or their counsel of record, sec. reg.

M'RELL *vs.* M'RELL.

Divorce—Jurisdiction.

The libel in a proceeding in divorce must be presented to the Court of Common Pleas of the county where the injured party resides.

The affidavit to such libel must be made before a proper official of the same county.

Review of the statutes and decisions.

In the Court of Common Pleas of Lehigh County. No. 67 April Term, 1912. Hannah McRell *vs.* John McRell. Divorce.

Dallas Dillinger and John R. K. Scott for Libellant.

The Master reported as follows: * * * The libellant testified that she was married to the respondent on December 15th, 1892, at Phillipsburg, N. J., and that after their marriage they resided at Catasauqua, Lehigh County, Pennsylvania, as man and wife, and continued to reside there until some time in the latter part of June, 1907, when she left the home of the respondent because of continued acts of cruelty upon his part, and went to the home of her father, in Moore Township, Northampton County, Pennsylvania, where she remained about a week and then went to Philadelphia, Pennsylvania, where she obtained employment as housekeeper in the family of Mr. John R. K. Scott, in whose family she has since resided. Mr. Scott, besides his city residence in Philadelphia, maintained a home at Cynwyd, Montgomery County, Pennsylvania, where he resided during certain periods of the year, and the libellant accompanied the family to said place. While so residing in Montgomery County, the libellant, on February 28th, 1912, pre-

sented her petition for a divorce to your Honorable Court, alleging cruel and barbarous treatment, etc. The libellant testified positively in her examination, that since June, 1907, she has not been a resident of Lehigh County, but has resided in the Counties of Philadelphia and Montgomery; and also sets forth in her libel that she is a resident of the County of Montgomery. From the testimony, it appears that the respondent has continued to reside, and still resides, at Catasauqua, in the County of Lehigh.

While the libellant may have shown sufficient statutory grounds to entitle her to a divorce from the respondent, yet, in the opinion of the Master, such a decree may not be entered in her favor because this Court is without jurisdiction to entertain her petition or libel.

The Act of March 13, 1815, Section 2, 6 Sm. 287, provides: "* * * If any person hath been, or shall be injured, as aforesaid, the husband, in his own proper person, or the wife by her next friend, may exhibit his or her petition or libel to the Judges of the Court of Common Pleas of the proper county where the injured party resides," etc., etc.

This provision was retained in the Act of April 20th, 1911, P. L. 60, Section 1, amending Section 2 of the Act of 1815, above quoted.

In Thompson *vs.* Thompson, 2 C. C. 573 (1885) it was held, that the provisions of the Act of March 13th, 1815, are mandatory and not directory, and that the libel in divorce must be exhibited in the county where the injured party resides and cannot be exhibited in any other county. Following this decision, the question came squarely before the Supreme Court of this State, in Sherwood's Appeal, 17 W. N. C. 338 (1886) and the Court decided, that where the libellant is a resident of Pennsylvania, she must exhibit her libel to the judges of the Court of Common Pleas of the proper county where she resides. This decision is in keeping with the principle enunciated in the case, in re Norwegian Street, 81 Pa., 349 (1876), that where in the Courts the authority to proceed is conferred by statute and the manner of obtaining jurisdiction is prescribed by statute, the mode of proceeding is mandatory and must be strictly complied with. In spite of these decisions by the Court of last resort in

this State, the precise question was again raised in the cases of Cain *vs.* Cain, 5 C. C. 669 (1888); Smith *vs.* Smith, 11 C. C. 465 (1892); Blaine *vs.* Blaine, 31 C. C. 560 (1903); Chiumento *vs.* Chiumento, 34 C. C. 320 (1906), the last two cases referring to and following the decision in Sherwood's Appeal, supra.

In the cases of Cain *vs.* Cain and Smith *vs.* Smith, it was argued that the domicile of the husband being legally the domicile of the wife, the wife was entitled to exhibit her libel in the county where the husband resided, but the Courts held that this is a mere fiction of law which does not obtain in proceedings in divorce, and that the libellant having a domicile within the state other than that of her husband, the libel should be presented in the county in which she resides.

In Ames *vs.* Ames, 7 Superior Court, 456 (1898), it was held that where the wife was compelled to go outside of the State to earn a living, and had no other residence in this State outside of the domicile of her husband, she could present her libel in the county where her husband resides. But in the case at bar, the libellant having always, since her separation from her husband, resided within the State of Pennsylvania, in the Counties of Philadelphia and of Montgomery, as aforesaid, the decision in Ames *vs.* Ames does not apply.

The Act of April 26, 1905, P. L. 309, provides: "That where a husband and wife shall be resident in different counties in this Commonwealth, and while they are so severally resident, a cause of divorce shall arise, the injured husband or wife may, at his or her option, institute and prosecute proceedings in divorce either in the county of his or her residence, or in the county where the offending husband or wife shall be resident and the cause of divorce shall have arisen," etc., etc. As the acts of cruelty alleged in libellant's petition, and testified to by her, occurred, and necessarily must have occurred, while she and the respondent resided together, in the County of Lehigh, the Act of 1905 is inapplicable. The Act applies only to those cases in which the cause of divorce arises while the parties are residing in different counties; nevertheless, the meaning of the words used in the Act was questioned in Ashton *vs.* Ashton, 21 D. R. 611, (advance sheets, July 23, 1912), and it was there held, that

where the libellant was a resident of Northampton County and the cause of divorce arose in that county while both the libellant and respondent were residing there, and the respondent afterwards left that county, and, at the time the libel was filed resided in Philadelphia County, the libellant continuing to reside in Northampton County, the Court of Common Pleas of Philadelphia County is without jurisdiction. See also McConnell *vs.* McConnell, 39 C. C. 525, (advance sheets, May 4, 1912).

The Act of 1815, above quoted, further provides, that the libellant "shall, together with such petition or libel, also exhibit an affidavit on oath or affirmation taken before one of the same judges or a justice of the peace of the proper county," etc., etc.

The affidavit to the libel in the case at bar was made before one Ralph N. Warner, Jr., justice of the peace. The venue is omitted from the affidavit and the imprint of the seal of the justice of the peace taking the affidavit is so poorly made as to be illegible, and it does not appear in the proceedings in what county Ralph N. Warner, Jr., is a justice of the peace in commission; but the master is of the opinion that your Honorable Court will take judicial notice of the fact that the said Ralph N. Warner, Jr., is not a justice of the peace in Lehigh county. Therefore, were the libel properly presented in this county, it would be defective in this respect and would have to be dismissed on this ground: Helt *vs.* Helt, 7 D. R., 746 (1898); Gambe *vs.* Gambe, 22 C. C., 23 (1899); Bush *vs.* Bush, 21 D. R., 744 (advance sheets, September 3, 1912).

Undoubtedly, the question of jurisdiction may be raised in actions at law at any time and the want of it will nullify any judgment or decree of a court, even long after it has been entered. In the case of Gambe *vs.* Gambe, supra, a decree of absolute divorce was vacated for want of jurisdiction, although the divorce had been granted more than thirty years previously. In that case, as in this, the libellant did not reside in the county in which she presented her libel and in which the divorce was granted, and on this ground, solely, the decree of annulment was made.

Under the circumstances of this case, were a decree entered in favor of the libellant upon the proofs presented by her, it could not stand, if attacked at any time in

the future, and might result in serious complications.

For the reasons above set forth, the Master and Examiner is compelled to recommend, that the decree prayed for be refused and the proceedings dismissed, for want of jurisdiction, at the costs of the libellant, and without prejudice to her to begin a new proceeding in the proper jurisdiction.

By the Court:

Now October 28th, 1912, for the reasons set forth in the clear and satisfactory opinion of the Master, Charles W. Kaeppel, Esq., the decree is refused.

HENRY C. HATTON *vs.* THE SCHOOL DISTRICT OF THE CITY OF SCRANTON, ET AL.

School District—Intervention of Taxpayers.

In case of any unsatisfied judgment or suit, or process of law, against a school district, or other municipal district in this commonwealth, any taxpayer by complying with the requirements of the Act of March 23, 1877, P. L. 20, shall have the right to intervene and defend said district as fully and completely as the officers of said district would by law have the right to do.

Where a petition for a writ of mandamus was presented to Court, the purpose of which was to compel the officers of a school district to deliver to the plaintiff tax duplicates of said district, and after the case was tried on its merits and a decision of the Court rendered, in pursuance of which, and agreement of the parties to the action, the duplicates were delivered to the plaintiff and the lawsuit ended, except as to the costs, a peremptory writ of mandamus will not be allowed at the instance of an intervenor whose petition to intervene was presented twenty-two days after the purpose of the writ of mandamus had been fully accomplished.

Rule to vacate order allowing taxpayers to intervene. Exceptions to findings of fact and law. In the Court of Common Pleas Lackawanna County. No. 639 January Term, 1912. Mandamus.

R. H. Patterson, for Plaintiff.
W. J. Hand, for Intervenor.

Edwards, P. J., November 18, 1912—We shall first consider the rule to vacate the order of May 22, 1912, permitting certain taxpayers to intervene and to come in and defend the school district in the above case. The

order was made tentatively at the time, so that no rights would be lost because of any failure on the part of the school district to file exceptions to the findings of fact and law of the trial judge, the case having been tried before a judge without a jury. The findings of the trial judge were filed on April 24, 1912; the petition of the taxpayers praying for the right to intervene was presented on May 22d, within two days of the expiration of the period for filing exceptions; and on the same day, viz., May 22d, exceptions were filed by the taxpayers' attorneys.

The question of the right of the taxpayers to intervene is still before us, and is to be determined in the present adjudication.

A brief statement of facts pertinent to the inquiry is necessary before discussing the question of law. The suit was begun originally against T. R. Brooks, City Treasurer, and Treasurer of the School District; and the petition asking for a writ of mandamus prayed that Brooks as treasurer deliver to the plaintiff the tax lists of school taxes unpaid on December 31, 1911. The school district, being the real party in interest, came in later and asked to intervene, under the provisions of the mandamus act. The prayer was allowed and the case was tried as between the plaintiff and the Scranton School District as defendant. The case was tried on its merits and was stoutly contested on both sides. As stated, the decision of the trial judge in favor of the plaintiff was handed down on April 24, 1912. In three days thereafter, the school board met to take action on the question of taking an appeal to the Supreme Court from the decision of the judge. The whole board met and the motion to appeal was lost by a vote of 6 to 3. A few days later, April 30th, the secretary of the school board directed the treasurer to deliver the school tax lists or duplicates to the plaintiff. On the same day all the tax duplicates, and books and papers relating to the collection of school taxes, delinquent for the year 1911, were handed over to the plaintiff, who, having qualified, proceeded at once to collect the taxes.

So far as the school board itself was concerned, it exercised its discretion and judgment in the interest of the school district; it accepted the situation in good faith,

treating the controversy as ended and the purpose of the writ of mandamus fully accomplished. Notwithstanding the deliberate action of the school board, the petition of nine taxpayers was presented on May 22d praying the right to intervene.

The statute on which the petitioners base their right to intervene is the Act of March 23, 1877, P. L. 20, which reads as follows:

"Section 1. Be it enacted, etc., that in case of any unsatisfied judgment or any suit or process of law against any township, borough, school or poor district, or other municipal district in this commonwealth, any taxpayer of said district may inquire into the validity of any judgment or defend said district in any suit or judgment, upon petition, accompanied by affidavit that said taxpayer believes that injustice will be done to said district in said suit or judgment, presented to the Court of Common Pleas in which said suit may be pending or judgment may exist, shall have the right to come into the court and defend said district in any suit, and inquire into the validity of any judgment against said municipal district, as fully and completely as the officers of said district would by law have the right to do: Provided, That said taxpayer shall, whenever the court shall deem it necessary, file in said Court of Common Pleas a bond with one or more sufficient sureties to be approved of by said court, to indemnify and save harmless said district from all costs that may accrue in said suit subsequently to filing said petition.

"Section 2. All acts or parts of acts inconsistent herewith are hereby repealed."

Counsel for plaintiff filed an answer to the taxpayers' petition, in which they claim, inter alia: (1), That the mandamus act of 1893 prescribes the exclusive mode of procedure for the intervention in mandamus cases of persons other than the parties to the suit; (2), that the petitioners have no such right or interest in the subject matter of the controversy as would entitle them to intervene in the proceedings under the said Act of 1893; (3), that the right of taxpayers to intervene under the Act of 1877 and to become parties in mandamus proceedings has been superseded by the mandamus act; and (4), that the action of the school board under the new school code,

when the board has fairly exercised the discretion vested in it by law, cannot be questioned by intervening taxpayers.

In considering the scope and effect of the Act of 1877 we should not overlook the sweeping character of the language used. Any taxpayer of a school district, etc., may come into the Court of Common Pleas and defend "any unsatisfied judgment," or, "any suit or process of law," or, "may inquire into the validity of any judgment;" or "defend said district in any suit or judgment;" or, "may inquire into the validity of any judgment against said municipal district" as "fully and completely as the officers of said district would, by law, have the right to do."

There are two distinct classes of cases where intervention is allowed by the courts. One is based on the existence of a direct interest in the intervenor in the subject matter of the litigation. We have instances of the right to intervene in such cases in our mandamus act, in equity proceedings, and in many actions at law, ejectment, replevin, interpleader, etc., etc. The other class of cases, where parties outside of the record are allowed to come in and defend, concern municipal bodies and affect the public interests. We have several statutes in Pennsylvania applicable to this class of cases; for instance, the Act of 1877, now under consideration. We have no doubt that the reason underlying this and other such legislation was the apprehension on the part of the Legislature that the officers or councils of some of the municipalities of the State, of some township, borough, county or school district, would fail, for one reason or another, in the full performance of their duties as guardians of the public interests. Experience has proven the wisdom of legislation of this character. There are plenty of instances in the records of our courts showing collusion with claimants on the part of municipal bodies, and gross negligence in the management of the financial affairs of municipalities, sometimes shown by the failure to appeal from reports of auditors and from judgments obtained before justices or aldermen, and further by the failure to prosecute and defend with due diligence the rights of the municipality in litigated controversies.

It is contended by counsel for the petitioning inter-

venors that the Act of 1877 leaves nothing to the discretion of the court, in considering a petition of a taxpayer to intervene, but the one question of requiring a bond as security for costs. If the petition conforms to the terms of the act accompanied by an affidavit that the taxpayer "believes that injustice will be done" to the district unless the intervention is allowed, then the court must grant the prayer of the petitioner, regardless of the merits of the petition. It may be that the motion to intervene is not made in good faith; or, that it is without merit, and is founded in caprice or disappointment; yet the petition must prevail and the order allowing intervention must be signed.

Regardless of our own views on this question, we shall give full effect to the Act of 1877 by allowing the order to intervene heretofore made in this case, to stand. We think the matter has been definitely settled in the case of Bell *vs.* Allegheny Co., 149 Pa., 381, wherein is construed the Act of 1878 relating to suits for or against a county. This Act and the Act of 1877 are the same in principle. We quote from the opinion of the Supreme Court in the Bell case as follows:

"The Act of June 12, 1878, P. L. 208, provides that any ten taxpayers, of any county of this commonwealth, may prosecute any suit or action in behalf of such county, or defend it in any suit, process, or action. If there exists any reason for such a statute, and of that the Legislature are the proper judges, it ought surely to be most liberallly construed. But it requires no liberality to hold that prosecuting a writ of error to a judgment against a county is prosecuting a suit or action in behalf of such county; and the appeal in this case is in everything but name and form a writ of error. It is, however, urged that the petition of the taxpayers should have been presented to this court rather than to the court below after final judgment. There would be much force in this contention if it were discretionary with the court to grant or withhold permission to intervene. But the act does not require any facts to be set forth in the petition from which the court can judge of the propriety of granting the prayer, or give the court any discretion in the premises, except to require or dispense with a bond to indemnify and save harmless the county from all costs

that may accrue subsequent to the filing the petition, and by the express terms of the act that bond is to be approved by the Court of Common Pleas, and filed among its records. The petition is, therefore, merely in the nature of a suggestion for the purpose of getting the taxpayers upon the record, and in that view may, with propriety, be filed in the Common Pleas with the bond."

We shall therefore discharge the rule to strike off the petition to intervene and shall direct the petitioners to give a bond as provided in the Act of 1877.

The second question before us, as contended by the plaintiff, is the futility of proceeding with the case, for the reason that the purpose of the writ of mandamus has been fully accomplished, and that there remains nothing to be further litigated except the question of costs. We think this contention is well founded. After the findings of the court were filed on April 24, 1912, the plaintiff and the school board proceeded to settle their dispute themselves. The board, in substance, agreed to accept the decision of the court as final, and immediately handed over the lists or duplicates of school taxes to the plaintiff, who proceeded at once to collect the taxes. According to the depositions it appears that when the exceptions were argued (October 28th) the plaintiff had collected about $40,000. His total duplicate amounted to $120,000; exonerations, abatements, etc., are estimated at 35 per cent. In other words, fully one-half of the duplicate had been collected, and the plaintiff is proceeding to collect the other half. The purpose of the mandamus proceedings was to compel the delivery of the tax duplicates to the plaintiff, who had given a bond to the school district in the sum of $40,000. The duplicates and papers were handed over to the plaintiff twenty-two days before the petition to intervene was presented to the court. It is true that no formal discontinuance was entered in the case; nor was there a formal and final judgment; but the law has regard more to the substance of that which is done than to the form. For all practical purposes the lawsuit is ended, except as to the question of costs; and the questions of law involved in the case now come within the line of academic discussion only. The issuing at this late day of a peremptory writ to command the school board to do an act which was fully performed last April

would be a futile use of legal process. The proposition would be different if the present action involved a judgment for a certain sum of money against the district instead of being an action to compel the performance of a ministerial act.

Defendant's counsel object to the consideration of the depositions filed October 28, 1912. The ground of the objection is the want of the notice prescribed by rule of court. The objection is a technical one at best. We shall overlook the five day rule in a case where the public interests are concerned. There was opportunity to cross-examine the witnesses. The parties undoubtedly had the right to take depositions because of the pendency of the rule and the answer thereto of the plaintiff.

We are clearly of the opinion that any modification of the findings of the court, under the circumstances above detailed by us in view of the action of the school board before the petition for intervention was filed would lead to much confusion in the collection of the taxes of 1911, and would be detrimental to the financial interests of the school district.

The last question to be considered relates to the exceptions to the court's conclusions of law. We have again gone over this part of the case and are convinced that the conclusions as first given must stand. We shall not repeat the discussion to be found in the report of the case as published in 21 Dist. Rep., 817, 13 Lacka. Jurist 123; but we want to emphasize the proposition that when the school board of twenty-two, known as the old board, elected a tax collector on November 27, 1911, the old board was acting under the new school code as fully as the new board of nine which came into office in the following December. It may be that it would have been in line with a wise and considerate policy to allow the new board, which was soon to come in, to elect the collector; but the courts are not concerned with the wisdom of municipal acts where the law lodges in the municipal bodies the power and discretion to act. We can only interfere where the act is ultra vires, or is a gross abuse of discretion. It is clear that on November 27th the old board, under the new code, had the power to elect a tax collector. That was the only office of that kind which the board could fill. It was necessasry to collect the school

taxes for 1911. The city treasurer, as an act of courtesy, and convenience to the public, had been receiving the school with the city taxes, but he was not the tax collector provided by the code. By whatever terms the old board designated the office to which the plaintiff was elected it was clear that his work was to collect the school taxes for 1911 and nothing else.

In directing judgment in favor of the plaintiff it should be with costs to be paid by the defendant, the Scranton School District. We see no reason for imposing costs on the intervenors. Their application to intervene was made in good faith and in the interest of the school district. Nevertheless, we are of the opinion that the intervenors should give a bond to cover the costs as provided by the Act of 1877.

We make the following orders:

1. The motion of counsel for the intervenors to strike from the record the depositions filed October 28, 1912, is denied.

2. The motion to strike from the record the paper filed May 11, 1912, and endorsed as a "return" is allowed.

3. The intervenors are directed to give a bond in the sum of $500 conditioned as provided in the Act of March 23, 1877, P. L. 20.

4. The exceptions filed to the findings of fact and law filed by the trial judge are overruled.

Now, November 18, 1912, the exceptions in this case are overruled and judgment is entered in favor of the plaintiff with costs to be paid by the Scranton School District.

M'NABB *vs.* CLEAR SPRINGS WATER CO.

Negligence—Master and Servant—Industrial Establishment—Water Pumping Station—Act of May 2, 1905, P. L. 352.

The furnishing of water to the public is a business involving the employment of labor, and, as such, a water pumping station is an industrial establishment within the meaning of the Act of May 2, 1905, P. L. 352, providing for the safety of employees in all industrial establishments.

In the Court of Common Pleas of Lehigh County. No. 47 April Term, 1912. William McNabb *vs.* Clear Springs Water Company. Trespass. Motions for New Trial and Judgment for Defendant, n. o. v.

Thomas F. Diefenderfer and Francis G. Lewis for Plaintiff.

Frank Jacobs, for Defendant.

Trexler, P. J., October 14, 1912. The first reason urged to set aside the verdict is that the Act of May 2, 1905, P. L. 352, is unconstitutional so far as any application of its provisions to a water pumping station. The title to the Act reads as follows:

"An Act to regulate the employment, in all kinds of industrial establishments, of women and children, employed at wages or salary, by regulating the age at which minors can be employed and the mode of certifying the same, and by fixing the hours of labor for women and minors; to provide for the safety of all employees in all industrial establishments, and of men, women and children in school houses, academies, seminaries, colleges, hotels, hospitals, storehouses, office buildings, public halls and places of amusements, in which proper fire escapes, exits and extinguishers are required; to provide for the health of all employees, and of men, women and children in all such establishments, storehouses and buildings, by proper sanitary appliances; and to provide for the appointment of inspectors, office clerks and others, who, with the Chief Factory Inspector, shall constitute the Department of Factory Inspection; to enforce the same, and providing penalties for violations of the provisions thereof; fixing the term and salaries of the Chief Factory Inspector and his appointees."

The first section of the Act defines the word "establishment" as "any place other than where domestic, coal mining or farm labor is employed; where men, women or children are engaged, and paid a salary or wages, by any person, firm or corporation, and where such men, women or children are employees, in the general acceptance of the term."

Are the words "all kinds of industrial establishments" broad enough to cover a water pumping station?

Under the definition given in Section First there is no doubt that such an establishment would be included, but we need not consider the definition given. The legislature has an undoubted right to define the term it uses, but when the meaning attached differs from the common understanding of the term, then notice of such special meaning must be given in the title with at least sufficient clearance to put readers on their inquiry. The application of the Act is therefore confined to the terms used in the title, and the question resolves itself as stated before as to whether the term "all kinds of industrial establishments" applies to a water pumping station.

"Industrial" is pertaining to industry, and industry in its general significance is any department or branch of ordinary occupation or business. It is true that we often hear the word industry employed in a straighter sense, but such use is not inflexible and does not prevent the use of the term with a broader meaning. Usage, of course, determines the standard, and we cannot say that the words in the title have such a restricted use as not to put the reader upon inquiry. We think the word "industrial establishment" covers every place where men are employed in a permanent way for wages.

We have no decisions in Pennsylvania upon the subject, but several Federal cases have been cited. Wells, Fargo Co. *vs.* Northern Pacific Railway Co., 23 Fed. Reporter 469, where an express business was held to be an industrial pursuit. In Carver Mercantile Co. *vs.* Hulme, 19 Pacific Reporter 213, the Court in discussing and construing the word says "We are referred to only one case in the briefs on either side in which the words industrial pursuit have received any construction. This was the case of Wells, Fargo & Co., 23 Fed. Rep. 469, decided in the U. S. Circuit Court of Oregon, in which it was held that the express business is an industrial pursuit, and one which the territorial legislature could provide for for the formation of corporations to engage in. Industry is defined by lexicographers to be habitual diligence in any employment, either bodily or mental, and industrial as consisting in or pertaining to industry." The court then applies the definition of the sale of goods by a merchant. In the case of Bashford-Vermista Co. *vs.* Agua Fria Copper Co. 35 Pac. Rep. 983, the sale of goods,

mining supplies, etc., was held to be industrial. The furnishing of water to the public is a business involving the employment of labor, and without any forced construction of the word or the words "industrial establishments," I think it properly included within the term.

The other reasons for a new trial need not be considered at length. The verdict was not excessive. The question of contributory negligence was raised, but the evidence was contradictory, and the matter was I think properly referred to the jury. There was evidence that the cog-wheels of the defendant were not properly guarded, and that plaintiff was injured through the defendant's omission to perform a statutory duty. Bollinger *vs.* Crystal Sand Co., 232 Pa. 636, Fegley *vs.* Lycoming Rubber Co., 231 Pa. 446. It is true the plaintiff had several ways to approach the grease cup in the replenishing of which he was hurt, but it did not appear that the way he didn't take was so obviously safer than the one he took as to warrant the Court to withdraw the case from the jury.

Now October 14, 1912, the motion for new trial is overruled.

Now, October 14, 1912, the motion for judgment n. o. v. is overruled and judgment may be entered upon the verdict upon the payment of the jury fee, and the defendant is given an exception to the action of the Court in refusing judgment n. o. v.

MULLER & BRO. *vs.* RITTERSVILLE HOTEL CO.

Landlord and Tenant—Trade Fixtures—Option to Purchase Leasehold with Appurtenances.

A lessor let unto the lessee a certain building in a park containing a caroussel, the lessee to purchase the caroussel and to install a new caroussel. The lease also contained an option in lessor to purchase the aforesaid leasehold "together with all things thereunto belonging or appertaining," at a given time and for a stated price.

Held, that, on exercise of the option to purchase by lessor, he acquired no title to the new caroussel.

In the Court of Common Pleas of Lehigh County. No. 24 September Term, 1912. Patrick J. Kilcullen, D. C. Muller and Albert F. Muller, co-partners trading under the firm name of D. C. Muller & Bro., *vs.* Rittersville

Hotel Company. Replevin. Rule for Judgment for want of a sufficient affidavit of defence.

H. A. Cyphers and G. R. Booth, for Plaintiffs.
Reuben J. Butz, for Defendant.

Heydt, P. J., 56th Judicial District, specially presiding, November 13, 1912. The plaintiffs sued out a writ of replevin for the following goods and chattels, to wit:

"One caroussel and gavioli cardboard organ, consisting of a three row, 48 feet in diameter, caroussel with galloping horses complete, 50 figures, gavioli playing organ, 1 10-horse-power electric motor, 1 1-horse-power electric motor, guy ropes, ring posts, decorations, two boxes of poles, lot of rings, 200 yards cardboard music, switchboard and electric wiring and all necessary appliances and sundry articles connected with the erection and operating of the caroussel situate in the Casino at Central Park, Rittersville, Pa."

The defendant gave a counter-bond and retained possession of the property.

The title to or ownership of the property in suit depends upon the interpretation of a lease between the parties to this suit. The lease being in writing its construction is for the Court.

The defendant is the owner of an amusement park, known as Central Park, located at Rittersville; in Central Park is a building known as the Casino building in which was installed a caroussel.

The contract of lease is dated April 24, 1909, and provides for two specific matters; first, the leasing of said Casino building, and second, the sale of the caroussel.

The contract of lease provides inter alia:

"Now therefore, for and in consideration of the sum of One Dollar to the Lessor in hand paid by the Lessees, the receipt whereof is hereby acknowledged, and of the covenants and agreements hereinafter set forth and of the payments to be made as hereinafter mentioned, the parties hereto for themselves respectively and their respective successors, executors and administrators do hereby covenant and agree as follows:

"The Lessor doth hereby demise and let unto the Lessee a certain building known as the Casino in said

Park, and now containing the caroussel, which is situated immediately West of and adjoining the Roller Coaster, provided that said building shall be used only for the operation of a caroussel.

"To have and to hold the same unto the Lessees for the term of five (5) years, commencing on the twenty-second day of April, A. D., 1909.

"The Lessees shall have the right and privilege of renewing and extending this lease for the further term of five years, commencing at the expiration hereof, upon the same terms and conditions and subject to the same reservations as are herein mentioned and expressed, except that they shall have no further right to renew or extend the same, provided, however, that this lease shall not be renewed and extended unless the Lessor shall be thereto requested in writing by the Lessees at least three months before the expiration of the term hereby created.

"The Lessor hereby agrees to sell to the Lessees, and the Lessees agree to buy from the Lessor the coroussel with all its apurtenances now contained in said Casino, and to replace it with another as below mentioned, and the Lessees agree to pay for the same the sum of Thirty-five Hundred Dollars ($3500), which shall be paid as follows:

"$1,000 at the time of the signing of this contract, which amount is hereby acknowledged.

"$1,000 on July 1st, 1909.

"$1,000 on August 1st, 1909.

"$500 on August 15th, 1909.

"The caroussel to be the property of the Lessor until the full amount is paid.

"The Lessees for the consideration aforesaid agree to forthwith furnish and equip said Casino building with a three-row caroussel 42 feet or more in diameter, and with one row of jumping horses in accordance with the photograph hereto attached, and made a part hereof, and a gavioli 83-key cardboard organ with two drums, cymbals, etc. The Lessees also for the consideration aforesaid agree to paint the Casino and caroussel with one coat of paint during the month of May of each year of the duration of this contract, and keep the said Casino building and caroussel in good repair at their own expense.

"All of the aforesaid improvements and equipments shall be built and installed in accordance with such plans and specifications as shall be approved by the Lessor.

"In case the Lessees wish to change or remove said new caroussel or organ, it shall be done only with the written consent of the Lessor.

"The Lessees furthermore for the consideration aforesaid, agree to operate the aforesaid caroussel each and every day during the park seasons, to maintain it in good order and condition, to furnish and pay all help, and to pay the Lessor One Thousand Dollars ($1,000) per year, payable monthly in advance."

"The Lessees hereby grant unto the Lessor the right and option of purchasing the aforesaid leasehold, together with all things thereunto belonging or appertaining, on September 15th, 1909, at the price of $5,000, on September 15th, 1910, at the price of $3,500, and thereafter at the price of $2,000."

"At the end of said term the Lessees may remove their property from the demised premises, but shall do so without doing any damage thereto."

The Plaintiffs took possession of said Casino building April 24, 1909; made the payments on the old caroussel and installed the new caroussel as provided in the contract (at a cost of $10,000 as they allege).

The Defendant under section 8 of said lease on September 15th, 1910, undertook to exercise its option to repurchase the leasehold at the price of $3,500 and made a tender of the purchase money coupled with the demand that the Plaintiffs execute and deliver to the Defendant a bill of sale of the goods and chattels (the caroussel, etc.) This proposition the Plaintiffs refused.

The Defendant subsequent to September 15, 1911, twice notified the Plaintiffs of its readiness to pay $2,000 for the purchase of the leasehold, coupled with a demand for a bill of sale of said chattels which the Plaintiffs refused.

On May 20, 1912, the Defendant took possession of the Casino building and of said chattels, claiming that it had the right to repurchase the leasehold under the contract and that the said chattels were a part of the leasehold.

The consideration named in the contract is One Dollar.

The rental named in said contract is $1,000 per year payable monthly in advance and other good and valuable considerations.

The contract so far as it related to the caroussel was one of purchase and sale. It states the object of the contract thus:

"Whereas, said Lessees desire to lease the Casino building in said Park and buy the Caroussel for the purposes hereinafter mentioned." The provision is: "The Lessor hereby agrees to sell to the Lessees, and the Lessees agree to buy from the Lessor the Coroussel," etc.

When one party agrees to sell and the other party agrees to buy, when the terms agreed upon are carried into effect, the title passes from the seller to the buyer. That this was the intention of the parties to the contract is evidenced by the provision:

"The caroussel to be the property of the Lessor until the full amount is paid." If it was not the intention that the title should pass but that the caroussel should remain a part of the leasehold only, then there was no need for this provision.

There is also a provision in the lease that the Plaintiffs may remove their property. If they have no property, there would be no need for a provision giving them the right to remove it.

There is also a provision in terms for the removal of the new caroussel. This would be unnecessary if it did not belong to the Plaintiffs.

Without going into any extended discussion we are clearly of the opinion that when the Plaintiffs paid for the old caroussel it became their property; and that when they bought, paid for, and installed the new caroussel the title thereto remained in them; and that there is no rule of law or construction that made these chattels appurtenant to the leasehold, or made them fixtures to the real estate so that the title thereto would pass to the Defendant and that the Defendant could hold them as against the Plaintiffs. From which it follows that the Plaintiffs were not bound to accept the several offers of the Defendant as made to repurchase the leasehold; that the title and the right of possession of the chattels in suit is in the

Plaintiffs and not in the Defendants; and that the Plaintiffs are entitled to recover in this suit.

There is no merit in the defense that this suit cannot be maintained because the name of Patrick J. Kilcullen does not appear in the lease.

Now, November 13, 1912, the rule for judgment for want of a sufficient affidavit of defense is made absolute.

TOWNSHIP OF WHITEHALL *vs.* CLEAR SPRINGS WATER CO.

Townships—Townships of First Class—Taxation—License Tax—Police Powers—Ordinances.

Townships of the first class have the power to impose an annual mileage license tax on water mains.

An ordinance of a township of the first class, levying an annual mileage license tax of twenty-five dollars per mile on water mains laid within the township, is, under the circumstances, grossly out of proportion of the actual cost of necessary inspection, and therefore invalid.

In the Court of Common Pleas of Lehigh County. No. 39 September Term, 1911. Township of Whitehall *vs.* The Clear Springs Water Company. Assumpsit. Rule for Judgment for Defendant, n. o. v.

Thomas F. Diefenderfer and Francis G. Lewis, for Plaintiff.

Frank Jacobs and E. J. & J. W. Fox, for Defendant.

Trexler, P. J., September 11, 1912. The Township of Whitehall is a township of the first class. By ordinance of November 7, 1904, pages 102 to 103, the commissioners of the township fixed the license tax on all water companies operating in the township at twenty-five dollars per mile of mains per year as an inspection tax. Under the Act of 28th of April, 1899, P. L. 104, classifying townships, Sec. 7, Clause 5, the power "and generally to take all needful means for securing the safety of persons and property within the township" vested the townships of the first class with the right to impose a reasonable license tax on telegraph and telephone companies for each pole in the township. Lower Merion Township *vs.*

Postal Telegraph and Cable Co., 25 Pa. Sup. 306. The police power extends below the surface and the township has the right to impose a tax upon water mains. Kittanning Borough *vs.* Natural Gas Co., 219 Pa. 250.

The Act of the 17th of April, 1905, P. L. 183, does not apply to the present proceeding. The present suit was brought in assumpsit, and the cases decided under the Act of 1905 have no application.

We start out with the presumption that the authorities acted in good faith when they fixed the rate, and the question before us is whether the ordinance under the provisions of which this suit is brought is a valid exercise of the police power. Is the charge of twenty-five dollars per mile of pipe in this case obviously invalid? If the ordinance is unreasonable, oppressive or arbitrary it must be set aside. Delaware and Atlantic Telegraph Company license fee, 37 Pa. Sup. 151.

The amount of miles which the defendant company has laid in the township is 12.29, and at the rate of twenty-five dollars per mile per year the annual tax would amount to $307.25. This suit is brought for the tax accruing for six years, from 1906 to 1911 inclusive, and amounts to $1,843.50. Is the sum of $307.25, or $25 per mile reasonable? What does the inspection required cost the township, and does this license tax bear a reasonable relation to the cost of the actual or proper expense of the inspection from year to year?

The township by ordinance of October 9, 1905, provided for the employment of six men to act as road foremen, inspectors and police, at the rate of forty dollars per month. In the triple capacity in which they were employed they were required, First, as road foremen to keep and maintain the roads in the township in good and passable condition, and to keep the roads up to the standard laid down by the commissioners and the State law. Second, as inspectors, they were to inspect all wires, poles, and public highways occupied by water and gas mains at least three times per week, and in case they find anything dangerous, immediately fence off the same with a red flag in the day time and a red light by night, and to repair the same. Third, as police, they were to police the district according to the laws of the Commonwealth.

There are about sixty miles of road in the township,

twenty-one of which are improved, that is, macadamized. The salary of the inspectors was raised to fifty dollars per month and five men are actually employed instead of six. The inspection in some districts occurs three times a week and in others only once a week. The salary of each during most of the years for which suit was brought is $480 per year, and the salary of the five each year aggregated $2,400. Of this sum the water company is asked to contribute one-eighth.

There are other companies in the township which occupy some of the roads with poles and pipes, and these are assessed as near as can be ascertained from the rather unsatisfactory evidence submitted in sums aggregating about eight hundred dollars a year, although about one-sixth of the amount assessed is actually collected—why, does not appear.

Thus a total of $1,100 a year is levied for inspection. Of course in this case we are only concerned about the water mains, but the entire revenue from other sources realized from the same method of tax throws some light upon the question we are considering. I do not think any one would contend that a visit three times a week was required for the inspection of the water pipes. In fact the duties of the township police in this regard were performed at the same time when their other duties were being fulfilled. The mains being covered could not be inspected. If a leak occurred in the main, if of any size, it would soon manifest itself by water appearing on the surface; but such leaks were very infrequent. There was, however, a settling of the road from time to time at the place where the pipes were laid, and this required the attention of the township authorities. When openings were made, however, the same were to be restored to the former condition to the satisfaction of the board of commissioners, and failure to do so rendered the corporation liable to a penalty. An extra fee of one dollar was required for a permit to allow of the opening of the highway.

It must be remembered that this was practically rural property, in other words, there are no closely built up sections of the township such as would be in a large city. The pipes run through villages, but for the most part the houses are separated from each other. The

occasions for disturbing the surface of the street would not arise with anything like the frequency they would in a town or city. The life of the water mains is long. After the ground is settled the locality of the pipes can only be ascertained by a knowledge of its location other than that derived from any surface indications.

It must be remembered in considering the testimony submitted that this testimony of leaks and to occasions on which inspection was required extended over a period of six years. Ordinarily a water pipe put in the ground, if properly laid, remains there indefinitely without anything connected with it that would disturb the safety or the peace of the community or require any inspection by the township authorities. As said before, where frequent taps are made and paved streets are torn up the question that presents itself is entirely different. It is to be regretted that the Court has no authority to fix the sum which in its opinion would be reasonable. Under this proceeding the township either gets what it demands or nothing.

Each case must necessarily stand by itself, but considering all the testimony in this case, and considering the fact that the community through which these pipes run is not of the same character as a town or city, I am of the opinion that the ordinance is not a proper exercise of the police powers of the township, and that the tax is grossly out of proportion to the actual cost of necessary inspection, and therefore enter judgment in favor of the defendant n. o. v.

Now September 11th, 1912, judgment is entered in favor of the defendant n. o. v.

COM. EX REL. KOCH *vs.* COMMISSIONERS OF LEHIGH COUNTY.

Statutes—Amendment—Legislative District—Annexation to City, a Representative District—Acts of February 15, 1906, P. L. 21, and April 27. 1909, P. L. 213.

The Act of April 27, 1909, P. L. 213, amending the Act of February 15, 1906, P. L. 21, so as to re-apportion the City of Pittsburg into representative districts, did not affect other legislative districts.

The amendatory Act of 1909 did not affect the legislative district of the City of Allentown, so as to embrace within its limits territory annexed to said city since the passage of the Act of 1906.

In the Court of Common Pleas of Lehigh County. No. 129 September Term, 1912. Commonwealth of Pennsylvania, ex. rel. Harry I. Koch, *vs.* Walter H. Biery, et al., Commissioners of the County of Lehigh. Mandamus.

Dallas Dillinger, Jr., for Relator.

Francis G. Lewis, for Warren K. Miller, Defendant Intervening.

Max S. Erdman, for County Commissioners.

Trexler, P. J., October 3, 1912. By the Act of Assembly of 15th of February, A. D. 1906, P. L. 21, the State of Pennsylvania fixed the number of the general representatives in the State and apportioned the State into representative districts as provided by the constitution. Under the provisions of said act the City of Allentown constituted the First District of Lehigh County and elected one member. Since the date of the passage of said act the City of Allentown by ordinance approved June 4, 1907, annexed a portion of the township of South Whitehall containing 113.08 acres. By ordinance approved August 14, 1908, another portion of South Whitehall township containing 239 acres was annexed to said city. By ordinance approved January 18, 1907, a portion of the Township of Salisbury, containing 182 acres, was annexed to the city. By ordinance approved September 21, 1907, another portion of said Township of Salisbury containing 363 acres was annexed to said city. All of these parts so incorporated into the City of Allentown were by various decrees of the Court of Quarter Sessions of the County of Lehigh included in certain wards of said city and election facilities thereby provided for them.

The legislature passed an Act, April 27, 1909, the title to which reads: "To amend an Act entitled an Act to fix the number of representatives of the general assembly of the State and to apportion the State into representative districts as provided by the constitution, approved the 15th day of February, 1906, so as to reapportion the City of Pittsburg into representative districts."

Under said act the City of Allentown constituted the First District of Lehigh County and elected one member. The relator Harry I. Koch was duly nominated by the Democratic party as candidate for the legislature from

the first representative district of Lehigh County. He contends that the portions of territory annexed to the City of Allentown since the passage of the Act of 15th of February, 1906, should be counted in his representative district. The theory on which the petitioner claims to be entitled to have said districts included is that the Act of April 27, 1909, practically re-enacts section first of the Act of 1906, and that the amendatory act must be construed together with the original act as of the date of the amendment. In other words he asks that the Act of 1906 be now construed as if it had been passed the 27th day of April, 1909, the day of the amendatory act.

In support of this contention he cites Grant Township Water Company *vs.* Samuel W. Pennypacker et al., Vol. 6, Dauphin Co. Rep. 81, in which the following appears:

"In his work on the interpretation of statutes (sec. 196) Judge Endlich thus speaks of 'amendments' so as to read: 'It is perfectly clear that, as to all matters contained in the original enactment and not incorporated in the amendment, the latter must be held to have the effect of a repeal. But as to the remainder, i. e., that which, in the amendatory act, is declared thereafter to be its form and effect, it would seem that even an amendment in the phrase indicated does not have the effect of a simultaneous repeal and re-enactment, but that of a merger of the original statute in the new, leaving the old statute no vitality distinct from the new, and of force only as to past transactions, as to which it must be deemed to be continued in force from the time of its first enactment, whilst, as to new transactions, its whole force rests upon the amendatory statute."

Two difficulties lie in the way of applying this principle to the present contention. The constitution provides that no bill, excepting general appropriation bills, shall be passed containing more than one subject which shall be clearly expresssed in its title. Rules of construction are only aids to ascertain the intention of the legislature. In this case the amendatory act clearly expresses its purpose in the title. Its purpose is not to change the limits of the first representative district of Lehigh County, but it is to reapportion the City of Pittsburg into representative districts. If in the body of the act any other purpose

were attempted to be accomplished it would be contrary to the constitutional provision. We must therefore hold the effect of the act to the purpose set forth in its title. The intention of the legislature is evident, and we need no aid in arriving at what the law makers intended the act to accomplish.

Another reason why we can not adopt the theory of the relator is that even if we held, for the sake of argument, that the Act of 1906 is merged in the Act of 1909, the whole act would then contain the following: (I quote from section 2 of the Act of 1906.)

"The foregoing apportionment being based on the United States decennial census of one thousand nine hundred, each township, borough or ward created since the said census was taken, and not specifically named in this act, shall form a part of the district to which, by this act, the township, borough, or ward, of what it was at that time a part, is allotted."

The basis of apportionment is thus distinctly declared to be as of the time when the decennial census of 1900 was taken, and unless there is by subsequent acts some specific reference to a change of the boundaries of any district the districts must continue to be as they were at the time when the Act of 1906 was passed, and the basis of the apportionment must be considered as of that date.

Now, October 3, 1912, judgment is entered in favor of the defendants with costs.

WEILER, ASSIGNEE, *vs.* GEORGE.

Promissory Notes—Payment—Evidence—Unwilling Witness—Cross-Examination.

A judgment note for $4,487, held for many years and not entered of record, may be presumed by the jury to have been paid, from the evidence showing the dealings of the parties, the financial condition of the maker and holder, the bankruptcy of the holder, the absolute assignment by him of the note for $500, and the declarations inconsistent with the provisions of the note.

The legal plaintiff, who is also one of the defendant executors, appearing to have a personal interest in the plaintiff's claim, and proving an unwilling witness, after having been called on behalf of the defendants, may be contradicted by them.

In the Court of Common Pleas of Lehigh County. No. 10 September Term, 1912. John F. Weiler, Assignee

of Alfred J. George, *vs.* Ellen George and Alfred J. George, Executors, etc., of Jonas George, deceased. Assumpsit. Rule for New Trial.

W. L. Gillette and M. C. Henninger, for Plaintiff.
George M. Lutz and Fred E. Lewis, for Defendants.

Trexler, P. J., October 29, 1912. The suit was brought upon a judgment note dated August 8, 1895, for $4,487.00, given by Jonas George to his son, Alfred J. George, which note was not entered of record during the lifetime of the maker, and is now, after the lapse of many years, presented as a claim against his estate by John F. Weiler, assignee.

The giving of the note was not in question.

The defendants, by showing the dealings of the parties, sought to show that many things occurred between the parties to the note which were inconsistent with the relation of debtor and creditor. It appeared that the note was collectible, Jonas George being a man of means, that at times the legal plaintiff was in financial difficulties, that he took advantage of the bankrupt law, that he made an absolute assignment of the note for five hundred dollars, and that he had made declarations inconsistent with the provision of the note.

This testimony in some respects was contradicted, but it was sufficient to carry the case to the jury and, if believed, to raise the presumption of payment: Morrison *vs.* Collins, 127 Pa. 28; Woodward *vs.* Carson, 208 Pa. 144.

Objection was made that the defendants, after calling Alfred J. George, the legal plaintiff, as their witness, afterwards introduced evidence to contradict him. It appeared although the assignee of the judgment is the plaintiff on the record, Alfred George, the legal plaintiff, has an interest in the result of the suit (Testimony of John F. Weiler). He was on both sides of the case, being one of the executors of his father's estate and as such appearing as one of the defendants. He comes under the head of a necessary, unwilling or adverse witness. Grant *vs.* Cox, 199 Pa. 208; Citizens Gas Co. *vs.* Whitney, 232 Pa. 592 (599). Had his interest been disclosed earlier in the case, the plaintiff might have been requir-

ed to join him as one of the real plaintiffs benefically interested in the event of the suit, and one liable to be called as of cross-examination.

Objection was further made that a number of checks given by Jonas George to Alfred George were admitted, although Alfred George in some instances explained for what purposes they were given. They were allowed to go to the jury as showing the dealing between the parties, and as circumstances inconsistent with the relation of debtor and creditor. Alfred George's explanation of the checks was for the jury.

As to the admission of the schedule of assets filed by Alfred George in bankruptcy proceedings, it is insisted that the whole record should have been admitted. The Court examined the record. Counsel failed to call my attention to any other part of the record that would throw any light on the case. The schedule of assets was complete in itself, and it was unnecessary to cumber the record with a lot of papers that were irrelevant.

This covers all the reasons filed in support of the rule for a new trial.

Now, October 29, 1912, Rule for new trial is discharged.

IN RE LIQUOR LICENSES FOR 1913.

Reasons of a Court in Granting or Refusing Licenses.

In the Court of Quarter Sessions of the Peace for Lehigh County. March, 1913, License Court.

Trexler, P. J., Mar. 6, 1913. In considering licenses it must be remembered that the Brooks high license act is an act to restrain and regulate the sale of liquors and that licenses are only to be granted where in the opinion of the court such licenses are necessary, for the accommodation of the public and the entertainment of strangers or travelers. As I stated last year, taking the population of Lehigh county and the number of licensed places there is no doubt that we have a sufficient number; the demands of the drinking public are so largely supplied by bottlers and wholesalers and unlicensed clubs that the saloon business in many places is becoming

unprofitable, and frequent changes are made in the ownership of such places. Whilst in some places the demand for license seems to be strong we have not yet devised any just plan by which we can reduce the number of licensed places in certain districts where we have too many. It certainly would be unfair to take away the license of one man and allow another man to continue if both equally obey the law. I think the policy should be to allow the people who now have the license to continue in business so long as they make an honest effort to obey the law and not to increase the sale of liquors nor the competition of those engaged in the business by granting any new licenses. The more competition there is the greater is the temptation to overstep the bounds set by the statute.

In the Third Ward there are two applications for the Germania Hotel. I have suggested a means of settling the matter, but until I have further knowledge in the premises, I will withhold the license.

In the Fourth Ward the application for the license of the Friendly Inn is refused. Seventh street seems to be pretty well supplied with places where the drinking public can be accommodated. There is a license at No. 28 North Seventh, one at No. 37 North Seventh, one at 133 North Seventh, one at 120 North Seventh, one at 105 North Seventh, one at the corner of Seventh and Linden streets, and the Hotel Allen and Glick Brothers on Center Square. Certainly no one need suffer in that section for want of drink.

In the Fifth Ward there are two applicants for the southeast corner of Sixth and Linden streets; Walker having withdrawn, the license is given to Peter D. Schmoyer, the present occupant. Clinton D. Strauss is granted a license for the Penn Hotel.

The license of Jacob Max in the Sixth Ward is refused. The application is made particularly for the accommodation of the Hebrew population. Samuel Roth, having a hotel at the southeast corner of Second and Tilghman streets, was in court and testified that he furnished Kosher meals at his hotel and that he could accommodate all applicants.

The Columbia Hotel license is granted to Edward E. Fenstermacher.

The application of Harry T. Nagle, No. 724 North Seventh street, is refused. There is a strong remonstrance against this place.

Norman E. Danner is granted the license for No. 381 Hamilton street, and William W. Eisenhard the license for the West End Hotel, Eleventh Ward.

S. Templeton Moyer is granted the license for Nos. 264-266 East Walnut street, Fourteenth Ward, the application of Milton J. Reinhard having been withdrawn.

The license at No. 433 Railroad street, Emaus, is granted to Edwin Camp, William G. Wyncoop having withdrawn.

In Macungie, George E. Lynn, Main street, near East Penn Railroad, is granted a license.

Peter D. Fritzinger, Main street, Slatington, and August Spaeth, American House, Slatington, new applicants for old places, are granted a license.

Edwin W. Shearer, Minesite, is granted a license.

Wilson H. Henry, Eagle Hotel, Limeport, is granted a license. The application of Harvey E. A. Smith for Hosensack is refused. This was an old stand. Hosensack is not a large place, and the necessity for the license is not apparent. If the licenses were distributed equally throughout the county we would be inclined to grant this license, but Lower Milford must suffer want in this case by reason of the fact that some townships have too many.

William E. Bean, Stine's Corner Hotel, William A. Jones, Unionville Hotel, and Alfred Jones, Levan's, are granted licenses, new applicants for old places. The license of Benjamin L. Kern for Ballietsville, is refused. North Whitehall township has eleven licensed places, and the same reasons which I gave last year are present this year.

Thomas F. Miller, Wennersville Hotel, Eckert's, John H. Beidler, Albright's Tavern, Lewis A. Steckel, Seiple's Station Hotel, Harvey T. Keinert, Vera Cruz; Charles H. Keller, Friedensville, and Harvey W. Kuhnsman, Newside, new applicants for old places, are granted licenses.

Wholesale applications:

David H. Lewis and Alfred P. Balliet, both of Coplay, are refused. John L. Horlacher, new applicant for old place, Slatington, is granted a license. Franklin H.

Moritz, Hokendauqua, is granted a license, a new applicant for an old place. Louis F. Neuweiler, and others are granted a license, an additional member being admitted into the firm.

Samuel J. Evans, Slatedale, new applicant for bottler's license, is refused. There is a strong remonstrance against it.

Granville V. Bachman, Smith Distillery, half way between Saegersville and Pleasant Corner, new applicant for old place, is granted a distiller's license.

KEMMERER *vs.* BARTON MFG. CO.

Justice of the Peace—Certified Copy of Plaintiff's Claim—Act of July 7, 1879, P. L. 194.

An "attested" copy of plaintiff's affidavit of claim is not a "certified" copy required by the Act of July 7, 1879, P. L. 194, to be served on the defendant; and, the record failing to show the service of a "certified" copy, the judgment will be reversed.

In the Court of Common Pleas of Lehigh County. No. 66 June Term, 1912. H. T. Kemmerer, Plaintiff in Error and Defendant Below, *vs.* The Barton Packer Manufacturing Company, Defendant in Error and Plaintiff Below. Certiorari.

Reno & Iobst, for Plaintiff in Error.
Milton C. Henninger, for Defendant in Error.

Trexler, P. J., October 28, 1912. Judgment was entered in the case under the Act of July 7, 1879, Sec. 2, P. L. 194. The record does not show that the affidavit of claim was "duly certified" by the justice. It is true that the record contains the statement that true and attested copies of the statement were served, but the record shows no compliance with the act. We might perhaps be justified in holding that "attested" is the same as "certified" but we are not inclined to do so in this case. Whilst the copy actually served forms no part of the record, it was produced in court and shows that it was not certified as required by the Act of 1879.

Now, October 28, 1912, the proceedings are reversed.

ROGERS *vs.* WRIGHT.

Practice—Affidavit of Defence.

Judgment cannot be entered against a defendant for certain items of damage, not specifically denied in the affidavit of defence, if he sets up certain facts, which, if believed by the jury, would excuse his default in regard to the contract, and would be a defence as to all items of plaintiff's claim.

In the Court of Common Pleas of Lehigh County. No. 31 October Term, 1912. Clarence C. Rogers *vs.* James H. Wright. Assumpsit. Rule for judgment for want of a sufficient affidavit of defence.

Morris Hoats, for Plaintiff.
James L. Schaadt, for Defendant.

Trexler, P. J., December 2, 1912. Plaintiff declares for $187 being damages alleged to be due by reason of a failure on defendant's part in keeping an agreement into which he had entered for the purchase of certain real estate.

The plaintiff alleges that he had endeavored to make a tender of the deed but that the defendant evaded it. The defendant denies this allegation. He does not specifically deny all the items of damages set forth by plaintiff but denies any and all liability. The plaintiff desires judgment for such items of damage as are not specially denied. The recovery of any item of damage is necessarily premised upon the liability of defendant. Until that appears, he owes nothing. He alleges certain facts which if believed by the jury, would excuse his default in regard to the contract, and would be a defense as to all items of plaintiff's claim. Until defendant's liability is fixed, we can not consider the items of damage.

Now, December 2, 1912, rule discharged.

COM. EX REL. *vs.* COMMISSIONERS OF LEHIGH COUNTY.

Election Law—Representative Districts—Extension of Boundaries by a City Composing a District—Act of February 15, 1906, P. L. 21.

The City of Allentown was made a separate representative district by the apportionment act of February 15, 1906, P. L. 21. It afterwards extended its boundaries, thereby including within the city limits portions of the territory of another representative district. Held, that the voters in the annexed districts were not included in the representative district composing the City of Allentown, but remain in their original representative district.

In the Court of Common Pleas of Lehigh County. No. 40 October Term, 1912. Commonwealth, ex rel. William M. Gehman, *vs.* Commissioners of Lehigh County, Harry I. Koch, Intervenor. Mandamus.

Francis G. Lewis, for William M. Gehman.
Max S. Erdman, for County Commissioners.
Dallas Dillinger, Jr., for Intervenor.
Trexler, P. J., October 21, 1912.

FINDING OF FACTS.

First:—That by the Act of Assembly of February 15, 1906, P. L. 21, the number of representatives in the General Assembly of the State of Pennsylvania is fixed, the said State is apportioned into representative districts, and the County of Lehigh shall elect three members and shall be divided into three districts as follows: The City of Allentown shall constitute the first district, and elect one member; the Boroughs of Slatington, Coplay, Catasauqua, and West Bethlehem, and the Townships of Washington, Heidelberg, North Whitehall, Whitehall and Hanover, shall constitute the second district, and elect one member; and the residue of the County of Lehigh, not included in the first and second districts, shall constitute the third district, and elect one member.

Second:—That the relator, the said William M. Gehman, was duly and regularly nominated at the Spring Primary in the year 1912 as the Republican candidate for representative in the General Assembly of the Commonwealth of Pennsylvania in the said Third Representative District of the County of Lehigh to be voted for at the election to be held on November 5, 1912, and which nomination has been duly certified to the Secretary of the Commonwealth as required by law.

Third:—That by order and decree of the Court of Quarter Sessions of the said County of Lehigh, there was annexed to the City of Allentown on June 3, 1901, a part

of the township of South Whitehall, hereinafter called Tract No. 1, which is described as follows:

Beginning at the northwest corner of Seventeenth and Chew streets, thence extending along the north side of Chew street as extended south seventy-four degrees fifteen minutes, west fifteen hundred and forty feet to the west side of Lafayette street, thence along the west side of said street south fifteen degrees forty-five minutes, east eleven hundred and thirty-eight and five-tenths feet to a point on the southwest corner of Linden and Lafayette streets, thence along the south side of said Linden street north seventy-four degrees fifteen minutes, east three hundred feet to the southwest corner of said Linden and Nineteenth streets, thence along the west side of said Nineteenth street south fifteen degrees forty-five minutes, east nine hundred and ninety-five feet, more or less, to a point in line of land now or late of Jacob Scholl, thence along the same north eighty-one degrees forty-one minutes, east four hundred and sixty feet, more or less, to a point, thence along lands now or late of Simon Sweitzer, north seventy degrees twenty-four minutes, east seven hundred and eighty-five and two-tenths feet, to a point on the west side of Seventeenth street, the western boundary line of the said City of Allentown, on June 3, 1901, thence along the said western boundary line of the said city north fifteen degrees forty-five minutes, west twenty-one hundred and eighty-six and fifty-eight one-hundredth feet to the place of beginning. Containing seventy acres of land, more or less.

Fourth:—That by an ordinance of the said City of Allentown, another part of said township of South Whitehall, hereinafter called Tract No. 2, was annexed to said City of Allentown on March 22, 1904, and is described as follows:

Beginning at the southwest corner of Linden and Lafayette streets, thence along the west side of Lafayette street, being the western boundary line of said city on March 22, 1904, partly along lands of the estate of David Griesemer, and partly along lands of the Lehigh County Agricultural Association, north fifteen (15) degrees, forty-five (45) minutes west, twelve hundred and seventy-eight and five-tenths (1278.5) feet to a point on lands of the said Lehigh County Agricultural Society,

thence along the same, and partly through lands of the Greenwood Cemetery Association south seventy-four (74) degrees, fifteen (15) minutes, west, twelve hundred and thirty-seven and six-tenths (1237.6) feet to a point on the east side of the public road leading from Griesemersville to Albright's Tavern, thence along the same north, two (2) degrees west five hundred and sixteen (516) feet to a point one hundred and thirty (130) feet north of the middle of Gordon street, thence partly through lands of Henry Leh and partly through lands of Emanuel Schuman, south seventy-four (74) degrees fifteen (15) minutes, west, eight hundred and sixty-six (866) feet to a point one hundred and seventy (170) feet east from the middle of Twenty-third street, thence through lands of Henry Leh and Edwin Lichtenwalner, north fifteen (15) degrees, forty-five (45) minutes west, five hundred and eighty and eight-tenths (580.8) feet to a point one hundred and seventy (170) feet north from the middle of Liberty street, thence through lands of said Edwin Lichtenwalner, Muhlenberg College and Meyers and Arnold, south seventy-four (74) degrees fifteen (15) minutes west, fifteen hundred and eighty (1580) feet to a point one hundred and seventy (170) feet west of the middle of Twenty-fifth street, thence through lands of the said Meyers and Arnold, and one hundred and seventy (170) feet west from the middle of said Twenty-fifth street, and parallel thereto, south fifteen (15) degrees forty-five (45) minutes east, two thousand three hundred and fifty-nine and eight tenths (2359.8) feet to a point on the south side of an extension of Linden street of said city, thence along the south side of said Linden street, and through lands of Muhlenberg College, William L. Laros, Henry Leh, Fibre Works Co., estate of David Griesemer and lands of Alfred Griesemer, north seventy-four (74) degrees fifteen (15) minutes east, three thousand five hundred and sixty (3560) feet to the place of beginning; containing one hundred and fifty-two and nine-tenths (152.9) acres of land.

Fifth:—That by another ordinance of the said City of Allentown, a part of the township of Salisbury, hereinafter called Tract No. 3, was annexed to said city March 23, 1906, and is described as follows:

Beginning at a point in the western house line of

Seventeenth street and two and forty-two hundredths (2.42) feet north of the northwest corner of the intersection of Seventeenth and Walnut streets, thence along the western line of Seventeenth street fifteen degrees and forty-five minutes, east one thousand and seventy-four and forty-two hundredths (1074.42) feet to a point one hundred and forty (140) feet south of the southern line of Fairview street, thence extending parallel with same south seventy-four degrees and fifteen minutes west, nine hundred and eighty (980) feet to a point sixty (60) feet west of the western house line of St. George street, thence parallel with the same north fifteen degrees and forty-five minutes, west ten hundred and eighty-eight and thirty-five hundredths (1088.35) feet, to the boundary line of the City of Allentown as it was on March 23, 1906, thence extending along said boundary line north eighty-one degrees and forty-one minutes, east, one hundred ninety-seven and fifty-five hundredths (197.55) feet to a point, thence continuing along same north seventy-three degrees twenty-four minutes, east seven hundred eighty-four and two-tenths (784.2) feet to the place of beginning; containing twenty-four and seven hundred and twenty-five ten thousands (24.0725) acres of land.

Sixth:—That the United States decennial census of one thousand nine hundred was taken as of June 1, 1900, and was to be completed in two weeks in the City of Allentown, and in one month in the townships of South Whitehall and Salisbury.

Seventh:—That the said census of 1900 was taken in the said townships of South Whitehall and Salisbury as of June 1, 1900, and was completed by July 1, 1900, in said townships.

Eighth:—That the above mentioned and described Tracts Nos. 1 and 2 were a part of the said township of South Whitehall, and the above mentioned and described Tract No. 3, was a part of said township of Salisbury, at the time of the taking of said census of 1900.

Ninth:—That said Tracts Nos. 1, 2 and 3 were annexed to the said City of Allentown since the taking of said census of 1900.

Tenth:—That in each of said Tracts Nos. 1, 2 and 3, there are a number of electors who are qualified and entitled to vote at the election on November 5, 1912, for

representative in the General Assembly of the Commonwealth of Pennsylvania.

Eleventh:—That the townships of South Whitehall and Salisbury are a part of the said Third Representative District of the County of Lehigh.

OPINION OF COURT.

The Act of 15th February, 1906, an Act entitled: "An Act to fix the number of Representatives in the General Assembly of the State, and to apportion the State into representative districts, as provided by the Constitution" provides that the City of Allentown shall constitute the first district of the County of Lehigh and elect one member. The question before me is, do the words "City of Allentown" refer to the city as it was at that time when the census was taken, or do they mean the City of Allentown as it was on the 15th of February, 1906, the date of the passage of the Act. Ordinarily, the latter proposition would be correct; but Section 2 of the Act of 1906 provides: "The foregoing apportionment being based on the United States decennial census of one thousand nine hundred, each township, borough or ward created since the said census was taken, and not specifically named in this Act, shall form a part of the district to which, by this Act, the township, borough or ward, of which it was at that time a part, is allotted." It is evident that the legislature in passing the Act had in view the last decennial census. Their duty under the Constitution of Pennsylvania, Article 2, Section 18, is immediately after each United States decennial census to apportion the State, and although the reapportionment seems to have been delayed for a long time, apparently the legislature passed the Act so that it might be conformable to conditions as they were when the census was taken. It is, however, contended that Section 2, above quoted, refers only to such cases where the township, borough or ward was created between the taking of the census and the passage of the Act, and does not refer to a case like the one before us where merely a portion of the township was annexed to some other division. Following the strict language of the Act, there is certainly room for argument in support of this position, but the whole section must be taken together. In the first place, it explicitly says the apportionment is founded on the United States decennial

census, in other words, when the City of Allentown was considered by the legislature it was considered as a city containing the population shown in the census reports. It would also be rather absurd to make the boundaries of the representative district depend upon the whim of City Councils; and we would be compelled to come to the conclusion that where the annexed territory was created into a separate ward, such new ward would still continue to be outside the limits of the city so far as the representative district was concerned; whilst if said same territory were included in already existing ward or wards, it would become a portion of the representative district comprising the city. This could hardly have been the intention of the legislature, and it is more consistent with the whole section to take the view that when the legislature referred to the fact that each township, borough or ward created since the last census had been taken and not specifically named in the Act, should form a part of the district to which by this Act the township, borough or ward, of what it was at the time of the taking of the census a part, includes a change made of the portion of a township, borough or ward by a transfer into another representative district; and that notwithstanding such a change a portion of the township, borough or ward remained under the same political division as it was at the time of the taking of the census. Harry I. Koch, the candidate for Representative of the Allentown District has asked to intervene in the matter and alleges that a decision in favor of the relator would render him ineligible to the office for which he is running, as by such decision he no longer would be a resident of the City of Allentown so far as the representative district of the City of Allentown is concerned. We cannot consider the effect of our decision so far as Harry I. Koch is concerned. We do not pass upon his eligibility as a candidate, that is not before us. If he should be elected and his title to the office would be questioned, it would be in a different proceeding; the Court sitting in that case might take a different view of the Act than I do. However, I must follow my own opinion in the matter. There are no cases which have been brought to my attention in which this Section of the Act of 1906 has been construed. As I read the Act, the prayer of the petition must be granted.

The counsel for the relator may prepare a decree in accordance with this opinion.

STEWART CONTRACTING CO. *vs.* COUNTY OF LEHIGH.

Constitutional Law—Special Session of Legislature—Governor's Proclamation—Bridges—Act of March 5, 1906, P. L. 75.

The Act of March 5, 1906, P. L. 75, regulating the building of county bridges and the letting of contracts therefor, etc., is unconstitutional, it not being embraced within the Governor's proclamation, calling a special session of the legislature, "to designate the amount to be expended each year in the erection of county bridges and to take such other measures in regard to them as safety may require."

In the Court of Common Pleas of Lehigh County. No. 66, April Term, 1912. The R. T. & C. D. Stewart Contracting Company *vs.* The County of Lehigh. Assumpsit. Demurrer to Plaintiff's Statement.

Reeder & Coffin and Morris Hoats, for Plaintiff.
M. S. Erdman and Claude T. Reno, for Defendant.

Trexler, P. J. November 28, 1912. It was stated at the argument that plaintiff's case is dependent upon the view that the Act of March 5, 1906, P. L. 75, is unconstitutional. This act was passed at a special session of the legislature.

Among the subjects indicated in the call for the special session was "Sixth. To designate the amount to be expended each year in the erection of county bridges and to take such other measures in regard to them as safety may require."

The Act of March 5, 1906, P. L. 75, is an Act "Regulating the building of county bridges and the letting of contracts therefor, authorizing the borrowing of money to pay the same and providing for the punishing of persons who combine or conspire to stifle competition in bidding."

Article 3, Sect. 25 of the State Constitution provides, "When the general Assembly shall be convened in special session there shall be no legislation upon subjects other than those designated in the proclamation of the governor calling such session."

The call in its sixth clause authorized the legislature to pass laws in regard to the amount to be expended each year in the erection of county bridges, and to take measures as to their safety. The Act of 1906 does neither.

To argue that the regulation of the building of county bridges and the letting of contracts for the same has to do with their safety is far fetched, when we read the body of the act and find no reference to the safety of such structures or any reference to anything pertaining to that subject. The proclamation of the governor, it is true, need not be worded with the same particularity as a title to a statute, Liken's Petition, 223 Pa. 456—but the difficulty that presents itself here is that the purpose of the sixth section of the call is particularly stated, and therefore by its terms is limited in its scope.

The courts of Fayette and of Crawford counties have declared the Act of 1906 unconstitutional. Fayette Co. *vs.* County Commissioners, 18 Dist. Rep. 216, French Creek Bridge 39 Co. C. Rep. 67. I am of the same opinion.

Now, October 28, 1912, the demurrer is overruled with leave to the defendant to further plead as if plaintiff's statement had been served as of the above date.

COMMONWEALTH *vs.* KURTZ.

Justice of the Peace—Summary Conviction—Sunday—Act of April 22, 1794, 3 Sm. 179.

In summary conviction on the charge of circulating a petition on Sunday, the judgment will be reversed, where the record fails to show the nature of the petition, that the act was committed within the county, or the substance of the testimony. Such a record must charge an illegal offense, that the work done was not within the excepted class, and that the procedings were instituted within seventy-two hours of the commission of the offence.

In the Court of Common Pleas of Lehigh County. No. 33 September Term, 1912. The Commonwealth of Pennsylvania, Defendant in error and plaintiff below, *vs.* Harvey C. Kurtz, plaintiff in error and defendant below.

E. H. Stine, for Commonwealth.
W. H. Schneller, for Defendant Below.

Trexler, P. J., October 14, 1912. The defendant was charged with a violation of the Act of April 22, 1794, 3 Smith's Laws 179, in that he circulated a petition on Sunday. The record is defective in various respects. The plaintiff must show that the act had been committed on Sunday within the county, and must charge an illegal offence, and set forth that the work done was not within the excepted class.

There is nothing on the record to show what the nature of the petition was. We can easily suggest petitions which it would be perfectly proper to circulate on Sunday, such as the relief of the poor, the support of the gospel, and various others which we need not mention. So there is nothing on record to show that there was any particular act of worldly employment of which the defendant was guilty. The record fails to give the substance of the testimony. The record shows that the proceedings for the violation were not instituted within seventy-two hours as provided by section 4 of said act.

Now October 14, 1912, the proceedings are reversed.

HAINES ET AL. *vs.* ROBERTS ET AL.

Contract—Construction—Uncertain Terms—Province of Jury.

Where a written lease provides for a royalty on all slate mined and manufactured, including every description of material taken and sold from the premises, it is for the jury to determine the royalty from the evidence showing how the market price of slate was usually fixed, and what the general custom in the region was in regard to the sale of slate.

In the Court of Common Pleas of Lehigh County. No. 81 April Term, 1912. Assumpsit. Motions for New Trial and Judgment, n. o. v.

Frank Jacobs, for Plaintiffs.
Thomas F. Diefenderfer, for Defendants.

Trexler, P. J., January 6, 1913. The lease existing between the parties contains the following: "In consideration whereof the said lessees, their heirs and assigns, covenant, promise and agree to and with the same lessor, his heirs and assigns, to pay the rent and royalty as

follows: On all slate mined and manufactured by them including every description of material taken and sold from said demised premises, a royalty of eight per cent. which royalty shall be treated as rent.

The lessee contends that the meaning of the above clause is that the eight per centum provided as royalty is to be calculated upon the price of the slate at the quarry, that the words "taken and sold from said demised premises" refer to the premises as the place of sale, and that the price must be fixed in relation thereto.

I held on the trial of the case that the words referred merely to the source of supply and did not refer to the price; that the meaning was ambiguous and that the basis on which the royalty was to be calculated was not definitely stated in the lease. The place of sale was not to be the determining factor. If the slate were sold on the premises, or in the office of the company in Slatington, or in any other place, the percentage should be a definite amount, not dependent on the will of the lessee, or the place where the contract of sale was made. I allowed evidence to show how the market price of slate was fixed, what the general custom in the region is in regard to the sale of slate, and the testimony was to the effect that slate is generally sold F. O. B. cars, and this question of fact as to what was to be the basis for the reckoning of the eight per centum was left to the jury.

The jury adopted the method of calculating the royalty by the market price of the slate f. o. b. Of course, if the meaning of the language in the lease is plain the jury has nothing to do with its construction and to leave it to the jury was error. 12 S. & R. 136. I, however, could not judge of the meaning of the instrument without referring to facts appearing outside of the written contract. Graybill *vs.* Fire Insurance Association, 170 Pa., 75. Trexler *vs.* Reynolds, 43 Sup. 168. Glenn *vs.* Strickland, 21 Sup., 88. Standiford *vs.* Kloman, 234 Pa., 443.

Some effort was made to prove what construction the parties to the lease had put upon it, but the offer did not come up to the requirements laid down in the cases. Kane *vs.* Schuylkill Fire Insurance Co., 199 Pa., 205. Sternbergh *vs.* Brock, 225 Pa., 279.

Now January 6th, 1913, the motion for a new trial and for judgment n. o. v. is overruled.

PILGERT *vs.* BACHMAN.

Contract—Uncertain Terms—Will.

A contract, that in addition to the weekly salary to be paid to the plaintiff by defendant's testator, the latter would make a suitable provision for the plaintiff in his last will and testament, of a good share of his estate, provided the plaintiff stayed and continued to serve in the family until the death of the testator and his wife, is too indefinite in its terms to be enforced.

In the Court of Common Pleas of Lehigh County. No. 39 January Term, 1911. Assumpsit.

E. H. Stine and M. C. Henninger, for Plaintiff.
Fred B. Gernerd, for Defendant.

Trexler, P. J., January 6, 1913. Plaintiff relies upon an express contract which is stated as follows: "That at the time of the entry of the employ of the said Jacob T. Bachman he agreed and contracted that in addition to the weekly salary to be paid to the plaintiff by him he would make a suitable provision for the plaintiff in his last will and testament of a good share of his estate, provided the plaintiff stayed and continued to serve in the family until the death of Jacob T. Bachman and his wife."

The testimony at the trial was to the effect that decedent had promised the plaintiff a substantial portion of his estate. I entered a non-suit. The question which arises in the case is not whether the decedent promised to reward the plaintiff for her services by extra compensation if she continued with him until his death, but whether the promise so made was definite enough to render it enforceable. Sherman *vs.* Kitsmiller, 17 S. & R. 45, is the leading case on the subject. The promise there was to give plaintiff 100 acres of land. The court in that case after reviewing a number of English cases, decided that the promise was void for uncertainty.

In Graham *vs.* Graham, 34 Pa., 475, the promise was to give plaintiff as much as any relative on earth. It was held to be too indefinite.

The plaintiff in this case, however, claims that the contract presents a different aspect; that although it may be indefinite in its terms, still it may be rendered definite. Id certum est quod certum reddi potest, citing Thompson. Executor of Shalkop *vs.* Stevens, 71 Pa., 161, and cases

therein referred to. In that case, Sharswood, J., says, "The action only lies where a man assumes to do a certain thing. Not that this means an absolute certainty, but a certainty to a common intent, giving the words a reasonable construction. But the words must show the undertaking was certain; for in assumpsit for non payment of money it is necessary to reduce the amount to a certainty. Express promises or contracts ought to be certain and explicit to a common intent at least. They may be rendered certain by a reference to something certain." In that case it was held that the promise to "Provide and give plaintiff full and plenty after he was gone, so that she need not to work" was sufficiently definite as it was capable of ascertainment, "consideration being had of the condition in life of the plaintiff, what annuity would place her in such circumstances that she need not work."

There is a difference between the case we are considering and the above case and others of a similar import cited by plaintiff. In all those cases the certainty grew out of the certainty of the contract at the time it was made.

In the present case the attempt is to render the contract certain by declarations and acts of the decedent subsequently made, showing what he regarded as the proper understanding or interpretation of the contract; although the conversations are not all consistent with the contract relied upon.

The decedent at one time devised a house and lot to plaintiff. Afterwards, having doubt as to the title, he bequeathed what he considered its money value to the plaintiff. He died leaving her nothing. There is no evidence that plaintiff acceded to the idea entertained by decedent as to what constituted the compliance on his part with the contract, and thus made between the parties what would be a new and definite contract in place of the uncertain one. He still had the continuing right to reduce her legacy or bequest, and to change it as he saw fit. She must stand or fall by the contract upon which she sues and that is for "A good share of his estate" and there being no method by which to determine what is a good share of decedent's estate, the promise of the decedent is not enforceable in law by reason of its uncertainty.

Now, January 6th, 1913, the motion to take off the non-suit is overruled. And now, January 6th, 1913, the plaintiff excepts to the refusal of the Court to take off the compulsory non-suit entered in the above case and for her a bill of exceptions is sealed.

JONES *vs.* WOLFE.

Evidence—Failure to Produce a Written Contract—Practice.

Where a case is tried on the theory of an oral contract between the parties, and the defendant has in his possession a written contract and does not produce it, a verdict for the plaintiff will not be disturbed.

In the Court of Common Pleas of Lehigh County. No. 137 September Term, 1912. Assumpsit. Motion for New Trial.

W. LaMonte Gillette, for Plaintiff.
John G. Diefenderfer, for Defendant.

Trexler, P. J., January 6, 1913. The Court is asked to set aside the verdict and judgment for the reason that the verdict is not conscionable, that the contract between the parties was in writing and the case was tried on an oral contract. The answer to this is that the plaintiff without objection on the part of the defendant, tried the case as founded upon a verbal contract. Some slight reference was made to the fact that there was a written contract, but it was in the possession of the defendant, and no effort was made by either party to produce it at the trial. The defendant, if he had not possession of it, might have insisted upon its production, or this failing, proved its contents. Not having done this, I do not feel inclined to subject the plaintiff to the hazard of a second trial.

It now appears that the defendant has a copy of the written contract between the parties. Why he did not produce it at the trial does not appear.

It also appears that the motion for a new trial was made after the adjournment of court and contrary to our rules of court. In view, however, of the fact that I refuse the new trial on the merits, this feature of the case need not be discussed.

Now January 6th, 1913, the rule entered November 18th, 1912, is discharged.

STRAWBRIDGE & CLOTHIER *vs.* SEAGREAVES.

Contract—Construction—Surety.

A promise of one to pay the goods furnished to another "as fully as if purchased by myself, and be liable in each and every cause of action thereunder, whenever and as often from time to time as any action may lie against said principal debtor," is a contract of surety. That goods were furnished in excess of the amount fixed in the contract was immaterial.

In the Court of Common Pleas of Lehigh County. No. 30 September Term, 1912. Assumpsit. Rule for judgment for want of a sufficient affidavit of defence.

Arthur G. Dewalt, for Plaintiffs.
Thomas F. Diefenderfer, for Defendant.

Trexler, P. J., January 6, 1913. The defendant executed the following paper:

"Messrs. Strawbridge & Clothier, Philada., Penna. Gentlemen:

Your firm (whether constituted by its present or any other partners), will please, until you receive a written revocation of this request, sell and deliver to John M. Guth, of Allentown, Pa. (hereafter called the principal debtor) any and all goods that may be purchased of you by him or by others, for or in his name, and I do hereby promise you to pay all bills therefor punctually, as fully as if purchased by myself and agree to be liable on each and every cause of action hereunder, whenever and as often, from time to time, as any action may lie against said principal debtor.

It is stipulated and agreed that I shall not at any time be held liable on such sales by your firm beyond the amount of four hundred dollars, that payments may be made from time to time on account of purchases, and other sales may be made to said principal debtor still leaving me liable up to the amount thus limited, and that I shall be liable without any notice of the acceptance of this guarantee, and notwithstanding any settlements with said principal debtor by taking note or notes, or renewals thereof, by granting extension or extensions, or otherwise.

All goods which may hereafter be charged to said principal debtor in the books of your firm are to be pre-

sumed to have been furnished on the faith of this request and agreement, and the entries in said books shall be evidence of the sale and delivery of the goods in any suit brought against me on this contract and shall have the same force and effect in any such suit as they would have in a suit against the principal debtor.

Witness my hand and seal this 18th day of November, A. D., 1907.

G. W. SEAGREAVES (Seal)"

Witness: M. L. Seagreaves.

Suit has now been brought to collect the amount of four hundred dollars from the defendant. He filed an affidavit claiming that the goods were sold in excess of four hundred dollars, the amount fixed in the above paper, and that upon the principal debtor's failure to pay, plaintiff failed to notify him and that the plaintiff never notified him of their acceptance of this guaranty.

The most casual reading of the paper shows that it is a contract of surety, not a guaranty. Although the word "guarantee" is used the use of such word does not govern. The question is, what is the actual contract? His promise to pay was "as fully as if purchased by myself, and be liable in each and every cause of action thereunder whenever and as often from time to time as any action may lie against said principal debtor." His liability was to be independent of any extension given to the principal debtor, and no notice of the acceptance of the "guarantee" was requisite.

It would be hard to compose a paper of this character that would more straitly bind the surety. The limitation of the amount did not affect the contract. He was surety up to the amount stipulated. Above the amount the principal debtor alone was liable.

The view that the dealings between the original parties must be limited to the amount mentioned in the contract in order to hold the surety cannot be seriously maintained. The difference between contracts of surety and guaranty is set out at some length in Hartly *vs.* Berg, 48 Sup., 419. A further discussion of the matter in this case would not be profitable. To my mind the position of the defendant is that of surety beyond a doubt and accordingly his liability is fixed under the contract, and he, not denying that the principal debtor owed the

amount sued for, judgment must be entered against him.

January 6th, 1913, judgment is entered in favor of the plaintiff and against the defendant for four hundred dollars.

HANDY *vs.* KISTLER.

Will—Bequest of Income Without Limitation.

A bequest of "the interest annually of one thousand dollars," without any trusteeship to protect it, and no bequest of the principal, nor any limitation, is a bequest of the fund itself.

In the Court of Common Pleas of Lehigh County. No. 55 June Term, 1913. Assumpsit.

Lawrence H. Rupp, for Plaintiff.
Francis G. Lewis, for Defendant.

Trexler, P. J., January 6, 1913. Testator in his last will and testament provided: "As to my daughter Mary A. Eckert she shall have a home valued at one thousand, eight hundred dollars and the interest annually of one thousand dollars, and the balance of her share shall go to her absolutely and her heirs, and in the event of her marriage and that her husband should survive her, he shall have a home for his life, valued at one thousand, eight hundred dollars, and after his death, the same shall go to the heirs of my said daughter, Mary A. Eckert.

We are concerned about the bequest of one thousand dollars. Has Mary A. Eckert a right to the principal? The testator creates no trusteeship to protect it, and there is no bequest of the principal and no limitation.

It has been repeatedly held that a bequest of the interest of a fund without limitation is a bequest of the fund itself. Garrett *vs.* Rex, 6 W., 14. Campbell *vs.* Gilbert, 6 Whart., 72. Van Renselaer *vs.* Dunheim, 24 Pa., 252. Ins. Co.'s Appeal, 83 Pa., 312. Millard's Appeal, 87 Pa., 457.

The law is so well decided that further discussion of the question is unnecessary.

Now January 6th, 1913, judgment is entered in favor of Mary Eckert Handy and against Eugene M. Kistler for one thousand and sixteen and 94-100 (1016.94) Dollars.

MAX ET AL. *vs.* MILLER.

Sheriff's Sales—Petition for Possession—Husband and Wife.

On proceedings to gain possession of real estate sold on execution, the former husband of the defendant in the execution cannot claim a right of possession because of valuable improvements made by him.

In the Court of Common Pleas of Lehigh County. No. 2 January Term, 1913. Petition of Harris Max and Edwin Schneider to gain possession of real estate, sold to them under execution, from Jacob Miller.

Roy B. Woodring, for Petitioners.
M. C. Henninger, for Respondent.

Trexler, P. J., January 6, 1913. The matter is before me on petition and answer. The record title of the property in question was in Sarah Miller, and as her property it was sold at sheriff's sale. There is nothing on the record showing anything in her former husband, Jacob Miller. He claims he has the right of possession because he made valuable improvements on the property. How this can give him an interest in the property that would enable him to retain possession against one who has bought the property at sheriff's sale I fail to see.

Even if such a position was tenable, he having been the husband of the owner at the time the improvements were made, the presumption would be that the improvements were made for her benefit, and in the nature of gifts to her, 21 Cyc. 1297; Wylie *vs.* Mansly, 6 Co. C. 205; Rafferty *vs.* Rafferty, 5 Dist. R. 453; Earnest's Appeal, 106 Pa. 310. No proof having been submitted as to the damages suffered by the detention, none are inserted in the judgment.

Now, January 6, 1913, it is decreed that Harris Max and Edwin Schneider are the owners of the real estate described in the petition with the present right of possession thereof, and judgment is entered in their favor at the costs of the respondent, Jacob Miller.

LEHIGH VALLEY CORNICE WORKS *vs.* FOLTZ.

Judgment—Revival—Lien—Bankruptcy.

Where, after the entry of judgment as a valid lien on real estate, the defendant is discharged in bankruptcy, the lien of the judgment is not affected; but, on revival after five years from the entry of the judgment, the lien will be restricted to the real estate bound by it originally.

In the Court of Common Pleas of Lehigh County. No. 28 January Term, 1913. Lehigh Valley Cornice Works *vs.* Martha Foltz. Scire Facias to revive judgment. Rule for judgment for want of a sufficient affidavit of defence.

Ralph H. Schatz, for Plaintiff.
M. C. Henninger, for Defendant.

Trexler, P. J., January 6, 1913. Plaintiff recovered judgment before a justice on December 18, 1902, and by transcript duly filed February 3, 1903, obtained a lien against defendant's real estate. The judgment so entered was not revived within five years.

Plaintiff now seeks to revive it, and the defendant introduces the defense that she was discharged in bankruptcy of all debts that were provable September 13, 1904.

It is admitted that no personal judgment can be obtained against the defendant, and the effort is made to take her real estate for the satisfaction of the debt, the real estate being subject to the lien of the transcript under its entry of February 3, 1903.

It was decided in Arnold's Appeal, 34 Pa. 151, that the lien of a judgment though not revived within five years continues against the land of the debtor, and that the restraint of the lien of a judgment to a period of five years operates only in favor of purchasers from the debtor and judgment creditors, but is without limit against every one else. Ziegler *vs.* Schall, 209 Pa. 528, and cases cited.

A discharge under the national bankruptcy law does not cancel the debt, it destroys the remedy. It is personal to the debtor, and a valid lien is not affected thereby. Pepper & Lewis' Digest of Decisions, Vol. 2, Sec. 2025 and 2029.

Conceding that the plaintiff's lien did not expire he has the right to proceed against the property bound by

the lien. His remedy must, however, be confined to the property bound. If we allow a general judgment of revival to be entered the other property of the defendant, if any she has, will be bound, and her personal property will be liable to be taken in execution. It is true that such execution might be stayed upon application, but we prefer that the matter be determined without further proceedings. We therefore make the order accordingly.

Now, January 6, 1913, rule for judgment for want of sufficient affidavit of defense is made absolute, the lien of the judgment to be restricted to the following property: All that certain tenement and lot or piece of ground situate in the Borough of West Bethlehem, County of Lehigh and State of Pennsylvania, bounded and described as follows, to wit: Beginning at a point in the southern line of Broad Street where the same intersects with the eastern line of Seventh Avenue, thence eastwardly along the said southern line of Broad Street a distance in front on the said Broad Street of 33 feet to a point in said southern line of Broad Street at a distance of 290 (two hundred and ninety) feet west from the western line of Sixth Avenue thence extending south of the width of 33 feet along Seventh Avenue a distance of 150 feet to Shafer Alley, Bounded on the North by Broad Street, on the East by property now or late of C. F. Brown, on the South by Shafer Alley and on the West by Seventh Avenue.

BETHUNE'S ADMINISTRATORS *vs.* BOQUET DISTILLING CO.

Bill in Equity—Private Corporations—When Receiver Will Not Be Appointed—Rights of Execution Creditors—Act of 9 April, 1856, P. L. 292.

A judgment creditor of a distilling company, who had a first lien on the real estate, issued execution to sell it as well as the personal property. The company had been operating for an indefinite period at a loss, and in the sense that it was not able to pay its debts as they matured, was insolvent. Its assets, however, were greater than its liabilities. The creditors were four in number, of whom plaintiffs, who had a second lien, filed a bill in equity praying that the execution be stayed, a receiver be appointed and relief looking to a winding up of

the affairs of the corporation and a conversion of its assets into money and a distribution thereof to creditors and stockholders.

Held, that in the defendant, as a private corporation, the public have no direct interest; that it has not been made to appear that the execution or first lien creditor is doing anything except exercising his strictly legal right and that his judgment is anything else than a bona fide claim; that a receiver will not be appointed where its only effect would be to hinder and delay a creditor exercising nothing but his legal rights; that no violation of any provision of defendant's charter is either alleged or shown against the management by the corporation officers that would warrant the courts assuming control; that mere insolvency is not sufficient reason why a corporation should be taken from its corporate officers; that whenever the ordinary remedies provided by law are open to creditors, a receiver will not be appointed, and in the absence of any statute giving the power, a court of equity has no authority to act as a court of insolvency; that the bill be dismissed.

In the Court of Common Pleas of Westmoreland County Sitting in Equity, No. 810 Equity. Bill in Equity for appointment of a receiver, etc.

Marker & Hollingsworth, for Plaintiffs.
John T. Moore, for Defendant.

McConnell, J.:

FINDINGS OF FACT.

From the testimony and the admissions of the pleadings, the following facts appear:

1. One of the plaintiffs, Lyda J. Bethune, is a citizen of the State of Pennsylvania, and a resident of Wilkinsburg, Allegheny County, and the other Plaintiff, The Jeannette Savings & Trust Company, is a corporation of the State of Pennsylvania, having its domicile in the Borough of Jeannette, Westmoreland County, Pennsylvania.

2. The Defendant, The Boquet Distilling Company, is a corporation, duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal office in the Borough of Ligonier, County of Westmoreland and State of Pennsylvania, which borough is within the territorial jurisdiction of this Court.

3. The defendant company is engaged in the business of manufacturing and distilling whiskey from grains and other materials, and disposing of the same, which business is conducted in the said Borough of Ligonier, County of Westmoreland, and State of Pennsylvania.

4. A. L. Bethune, the plaintiffs' intestate, was, in

his lifetime, the owner of 98 shares of the capital stock of the defendant company, and said shares still stand in his name on the books of the corporation.

5. The defendant has an authorized capital stock of $30,000.00, divided into 600 shares of the par value of $50.00 per share. Of these 600 shares, 490 shares have been issued, and stand on the books of the company in the names of the following persons, viz: John T. Moore, 294 shares; I. V. Trimble, 97 shares; W. J. Trimble, 1 share; A. L. Bethune, 98 shares. The remaining 110 shares have never been issued.

6. The assets of the defendant company are of an approximate value of $11,500.00. This includes real estate, machinery, a stock of about 8000 gallons of whiskey, and all other assets.

7. Business conditions will not make it possible for the defendant to run at a profit, when depression in the market and the cost of production are considered. For a period left indefinite in extent in the testimony, the distillery has been conducted by the company at a loss.

8. At No. 835 May Term, 1912, Jacob Adolph caused to be entered of record a judgment confessed by the Boquet Distilling Co. executed by John T. Moore, Treasurer, for the sum of $4,500.00, with interest from the second of May, 1912. This judgment was entered on the third of May, 1912. On the 22d May, 1912, a Fi. Fa. was issued on the above judgment which made it a lien on defendant's personal property. This judgment is a first lien on the real estate, and the Fi. Fa., as above stated, is a lien on the personal property of defendant. On the 29th of May, 1912, the pending bill was filed, and, during its pendency, the execution was stayed by order of court, liens and levies preserved.

9. At No. 917 May Term, 1912, Geo. H. Trimble, and the present plaintiffs acting in behalf of the estate of their decedent, recovered a judgment of $1,109.50 against the Distilling Co. by default. Geo. H. Trimble and the estate of A. L. Bethune, deceased, each own one-half of the above judgment. This judgment was entered on the 28th day of May, 1912, the day before the filing of the pending bill. There are no other judgments than those mentioned in paragraphs 8 and 9 against the defendant company.

10. At No. 271 May Term, 1912, the present plaintiffs, in behalf of the estate of their decedent, brought suit for the sum of $1,042.82 against the Boquet Distilling Company. This suit was commenced on the 2d day of March, 1912. An affidavit of defense to the whole of the claim has been filed. The case has been put at issue—but has not yet been tried.

11. At No. 927 May Term, 1912, John T. Moore brought suit against the defendant company for the sum of $1,357.08. This suit was brought on the 10th of May, 1912, and has not yet been reduced to judgment.

12. Aside from taxes, (estimated at $300.00), the defendant owes no other debts of any consequence. Its creditors are four in number, viz: Jacob Adolph, John T. Moore, George H. Trimble, and the estate of A. L. Bethune, deceased.

13. The aggregate of all the claims against the defendant will approximate $8,500.00.

14. There are outstanding no uncollected claims due to the corporation.

15. The defendant has for the payment of the claims mentioned in paragraph 13, the assets mentioned in paragraph 6, which are of the estimated value of $11,500.00. In the sense that it is not able to pay its debts as they mature, the defendant is insolvent. Its assets, however, are greater than its liabilities.

16. No violation of any provision of defendant's charter is either alleged or shown against the management by the corporation officers. The corporation is alone made defendant in this case.

CONCLUSION OF LAW.

The court is of opinion that the foregoing facts show no sufficient ground for appointing a receiver, at the instance of plaintiffs, or for staying the execution of Jacob Adolph against defendant's property.

DISCUSSION.

It has not been made to appear that Jacob Adolph, in issuing his execution, is doing anything except exercising his strictly legal right. It has not been attempted to show that his judgment is anything else than a bona fide claim against the corporation. This is purely a private corporation. It does not have the power of eminent domain. It renders no service to the public. In the

establishment of a receivership for a quasi-public corporation, the interest of the public may demand protection at the hands of the court, and this public interest may make the appointment of a receiver proper, but this public interest does not exist in the case of a private business corporation discharging no public function whatever. "In the case of a private corporation, the public has no interest which gives it the right to be heard; any averment that will avail to create a receivership must be such as will show that a receivership is necessary to promote and protect the interest of the stockholders and creditors." Cowan *vs.* Plate Glass Co. 184 Pa. 9, per Trunkey, J. "If a corporation is purely private, and the public has no direct interest in its operations, or rights concerning them, its property, however useful and necessary for the conduct of its business, may be sold under an ordinary writ of fieri facias, in the same manner as the property of an individual; and in such case, the plaintiff in the execution is entitled to the fund raised by the sale, to the exclusion of general creditors." Reynolds *vs.* Reynoldsville Lumber Co. 169 Pa. 626.

It is the averment of this bill that Jacob Adolph already has a lien on the real estate of the defendant, and that he has also obtained a lien on the personal property, by virtue of his execution. The appointment of a receiver would not divest him of these legal rights, but would leave him as completely possessed of his legal advantage as he was before except that it would have an effect to restrain him from the immediate exercise, in the ordinary way, of those legal rights; but a receiver will not be appointed where its only effect would be to thus hinder and delay a creditor exercising nothing but his legal rights. Bell *vs.* Wood, 181 Pa. 175. There is no allegation or proof that this judgment is not a bona fide debt of the corporation, obtained by strictly legal means. It was obtained by confession, it is true, but there is no proof that such confession was not authorized by proper corporate action. Even assuming that the corporation was insolvent at the time, and that the effect of the confession was to give a bona fide creditor an advantageous position over other creditors, and thereby work a preference, the transaction would not be illegal, but, on the contrary, would be entirely legal. "In Pennsylvania, an

insolvent corporation may prefer a creditor by a confession of judgment." Pairpoint Mfg. Co. et al. *vs.* Phil. Optical and Watch Co. et al., 161 Pa. 17; Lake Shore Banking Co. *vs.* Fuller, 110 Pa. 156.

We must conclude, therefore, that the judgment and execution of Jacob Adolph are entirely valid, and are being utilized by him in no other way than as the law warrants. Nor is the opinion of the plaintiffs in this bill that the property of the corporation could be more advantageously sold by a receiver than by a sheriff, any ground for the appointment of a receiver, and for restraining an execution creditor from effecting a sale by proper legal process. "A sale under a judgment confessed by an insolvent corporation will not be restrained by a court of equity on the ground that a sale of the company's property can be more advantageously conducted in the interests of all the creditors by receivers. Until the rights of the other creditors are violated, no one has a standing to challenge the execution creditor's right to use the means provided by law for the enforcement of his claim." Pairpoint Mfg. Co. et al. *vs.* Phil. Op. and W. Co. 161 Pa. 17. On page 22, Mr. Justice Fell says: "The appellant is pursuing the regular and orderly course for the collection of a judgment lawfully obtained for a debt admittedly due. This is its right. The interests of other creditors may be affected thereby, but, until it is shown that their rights are violated, no one has standing to challenge appellant's right to use the means provided by law for the enforcement of its claim."

It may dissipate the assets of defendant. and take them away from the reach of other creditors—(as the bill suggests)—to have such assets levied on and sold by the execution issued by Adolph, but wherein does that proceeding violate any legal right of the present plaintiffs, or how can it authorize a court of equity to take away the plain legal right of the execution creditor to so proceed? Whether sold by a sheriff or by a receiver, the proceeds of the sale would be distributed in precisely the same way. "The appointment of a receiver for property does not affect preexisting liens upon the property, or vested rights or interests of third persons therein." 23 Ency. 1043; Wilt *vs.* Reed Elec. Co. 187 Pa. 424; Lane *vs.* Washington, 190 Pa. 230; Com. *vs.* Order of Vesta, 156 Pa. 531;

Hays *vs.* Lycoming Co. 99 Pa. 621. The legal priorities of creditors already lawfully obtained would determine the mode of distribution. The idea that, if a receiver of this kind of a corporation should effect a sale, all creditors, regardless of legal priorities, will come in on the fund, in proportion to the amount of their respective claims, is not tenable. The distribution of the proceeds of the sale of an insolvent private corporation by the ordinary legal process does not differ from the distribution of the proceeds of the sale of the property of an insolvent individual, when effected in the same way. The eighth paragraph of the bill, after reciting the obtaining of a lien on the property of the corporation, through the judgment and execution of Jacob Adolph, says: "Your orator is of the opinion that the assets of the said company will be dissipated and sacrificed. That this creditor, Jacob Adolph, will secure payment to which he is not entitled, and will secure a preference over other creditors. That great loss will result to all of the other creditors of the said corporation, and also to the stockholders, etc. * * * * That unless steps are taken to preserve the estate of the defendant corporation, that action on the part of the creditor who is having the property sold at sheriff's sale, will result in the breaking up of the assets and property of the defendant corporation, and making great loss to the stockholders and creditors of the said corporation." Conceding that Jacob Adolph would, through his judgment and execution, acquire an advantage not enjoyed by other creditors, and that their enforcement against defendant's property would have the effect of taking such property out of the control of the defendant, and out of the reach of other creditors and the stockholders of the company, what infringement of plaintiffs' legal right is involved in pursuing such a course?

Plaintiffs ask relief, first as creditors, and, second, as stockholders. One creditor of a defendant has no right to ask a court of equity to stay the execution of another creditor, merely because, if that be not done, the property of the common defendant will be put beyond the complainant's reach, and he will thereby suffer great loss. Neither will he have the right, as a stockholder, to stay the writ of a creditor seeking to collect, by legal means, an entirely valid debt owing him by the corporation,

because, if the corporation's property is thus taken, the complainant and other stockholders will suffer loss. Of course they will, and so does every debtor suffer loss, when his creditor, by an execution, seizes upon his property, to obtain satisfaction of his claim—but he suffers that loss according to law, and not in violation of it. A court of equity is as much bound to respect the legal rights of an execution creditor as a court of law is. Although it is said that a receiver should be appointed to avoid a multiplicity of suits, yet such multiplicity in this case, is impossible. The creditors are four in number. There are no scattered assets to collect. To appoint a receiver is to take the affairs of the corporation out of the hands of its own officers, and to commit them to the appointee of the court. This the court will not do, even in the case of insolvency, unless the corporate officers should be guilty of fraud or oppression, or mismanagement,—a thing not alleged in this case. The corporate officers are not even made parties to this bill. "Though a stockholder of a corporation may interfere in equity for the protection of the company, yet something less or more than what is allowed by the terms of the charter, must have been done by the managers or directors, to authorize such an interference." Gravenstine's Appeal, 49 Pa. 310. "The policy of the law is to leave the affairs of a corporation to the management and control of its own chosen agencies, and that a minority of the stockholders will not be permitted to displace corporate authority and control and substitute therefor, the policy, management and control of the courts, except in plain cases of such fraud or maladministration as works manifest oppression or wrong to them." Anderson on Receivership, p. 502, sec. 351. "The fundamental principle of a corporation is that a majority of its stockholders have the right to manage its affairs so long as they keep within the charter, and a court of equity will not interfere merely to prevent unwise or improvident acts; there must be fraud or infringement of the legal rights of some one, to justify taking matters out of the hands of the officials." Anderson on Receivers of Corporations, sec. 351. The management of this corporation is not assailed by allegation or evidence that would warrant the court's assuming control. The other grounds are also inade-

quate. "An application by stockholders for the appointment of a receiver of a corporation will be refused where it appears that there is no charge of mismanagement, that there are not scattered assets to be marshaled, and that the only effect of granting the application would be to hinder and delay the collection of valid claims." Bell *vs.* Wood, 181 Pa. 176.

Mere insolvency is not sufficient reason why a corporation should be taken from its corporate officers. They can deal with that question, unless other complications intervene. "A court of equity has not inherent power to appoint a receiver of a corporation because of mere insolvency, which does not create those conditions of imminent peril and extreme necessity, which alone authorize the exercise of this extraordinary jurisdiction over corporate bodies. To question the proposition asserted would be to deny the right of the stockholders and officers of a corporation to manage and control the company's affairs under ordinary circumstances. Courts of equity have no greater control over the affairs of a private corporation, when it becomes insolvent, than they have over the affairs of an individual." Anderson on Receivers, sec. 352. "Whenever the ordinary remedies provided by law are open to creditors, a receiver will, of course, not be appointed; nor will the court appoint a receiver when a judgment creditor applying therefor has at his command the ordinary means at law of enforcing the collection of his judgment. If there are no assets a receiver will not be appointed." Gluck & Beckers' Receivers, sec. 20 p. 75. The plaintiffs, although judgment creditors, have never exhausted their legal means against the corporation.

The 7th prayer for relief seeks a winding up of the affairs of the corporation, a conversion of its assets into money and a distribution thereof to creditors and stockholders. In dissolution proceedings, it is sometimes necessary to appoint a receiver as being ancillary to the accomplishment of the end in view. But under the facts of this case, the question of whether the business of the corporation should be continued or not, rests with the stockholders. "In the absence of any statute giving the power, a court of equity has no authority to act as a court of insolvency for the liquidation of the affairs of an insol-

vent corporation." Gluck & Becker on Receivers, p. 66, sec. 17. The Act of 9 April, 1856, P. L. 293, gives the Court of Common Pleas authority to dissolve a corporation, on "the petition of any corporation, under the seal thereof by and with the consent of a majority of a meeting of the corporators duly convened, praying * * * * for the dissolution of such corporation"—but it does not give the court authority to do so at the instance of a minority of stockholders. It is a fundamental principle of a corporation that the will of the majority should control. A dissatisfied minority of stockholders will not be permitted to displace the control of the majority of the stockholders and take over the management of the corporation through the instrumentality of a receivership. Cromlie *vs.* Order of Solon, 157 Pa. 586.

There is no reason shown for the intervention of a court of equity in this case and the bill should, therefore, be dismissed at the costs of the plaintiffs. A decree ordering that it be so done may be drawn, unless exceptions to these findings be filed within the time prescribed by the equity rules.

NOTE:

There is no printed bill in this case. If a strained construction of Equity Rule XIV were to make it comprehend an application for a receiver, as being substantially an injunction,—the bill would still be finally dismissed, as of course because within twenty days from its filing, printed copies thereof have not been filed and served.

Although, through the automatic operation of this rule, the bill is not in court, it nevertheless seems to be desired that the court go through the form of disposing of the case on a consideration of its merits—and it has accordingly been so done.

ESTATE OF MARY J. STYER, DECEASED.

Testatrix divided her estate into five equal shares and gave one of said shares to the children of her sister. When the will was executed the sister and her children had been long deceased, which she knew, having attended their funerals. The children of her sister left children surviving.

Held, under the facts, that the grandchildren of the sister were entitled to said share, per capita, being included in the term "children," from necessity to make the will operative.

Adjudication.

Freas Styer, Esq., for Accountant.
Wm. F. Dannehower and Elbert H. Pusey for grandchildren of Hannah Phipps.

Solly, P. J., April 18, 1913. Mary J. Styer, a resident of the Borough of Norristown, died on the 29th day of January, 1912, leaving surviving no husband or issue.

Her will bearing date the 10th day of June, 1909, was duly admitted to probate the 6th day of February, 1912.

The provisions of the will of the testatrix are as follows:

"After my executor shall have marshalled my estate, I give, devise and bequeath the same into five equal shares and proportions as follows:

To the children of my brother, Anthony W. Morris, one equal part or share. To the children of my sister, Hannah Phipps, one equal part or share. To the children of my deceased brother, Samuel Morris, one equal part or share. To the children of my brother, Joseph E. Morris, one equal part or share. To my sister, Esther Morris, one equal part or share.

In the event of the death of my sister, Esther Morris before my decease, then and in that event the share given and bequeathed to her shall be divided between the children of my deceased brothers and sister, share and share alike."

I find from the evidence received at the audit that no nephew or niece of the testatrix died after the execution of the will.

Esther Morris, the sister, is living.

The children of Anthony W. Morris are Joseph T. Morris, Kathryne Morris, Esther Baldwin, William Morris, Ella Morris, Mary Morris and Elizabeth Morris.

The children of Samuel Morris are John Morris, Eva Morris, Hannah Baker and Samuel Morris.

The children of Joseph E. Morris are John A. Morris, Herman B. Morris, A. Wayne Morris, Irwin S. Morris and Joseph Martin Morris. They are all living and of full age.

The children of Hannah Phipps were dead when the

will was executed. They were three in number, John, Esther and Mary. John died March 29, 1899. The testatrix was at his funeral. He left issue two children, Horace E. Phipps and Elizabeth Phipps, the grand-children of Hannah Phipps. Both are minors, having for their guardian the Chester County Trust Company, appointed by the Orphans' Court of Chester County September 2, 1912. Esther or Etta Reese died May 27, 1903, leaving issue one child, a minor, Daisy, who has the Penn Trust Company for her guardian appointed by this court. The testatrix was present at the funeral of Esther. Mary Phipps died in 1904 or 1905, without issue. The testatrix, therefore, knew when she made her will that all of the children of her sister, Hannah, had long been deceased. This is a significant fact in the determination of the question whether the grand-children have the right to have awarded them, as they claim by their guardians, the one-fifth of the residue of the estate of the testatrix under the bequest to the children of Hannah Phipps. She long pre-deceased the testatrix.

The intention of the testatrix to make a full and complete disposition of her estate, after the payment of debts and funeral expenses, to her next of kin in the proportions fixed by the statute of distributions, is plainly manifest from the will. She divides the estate into five equal shares or proportions, and gives a portion to the children of her brother, Anthony; another portion to the children of her sister, Hannah; another portion to the children of her deceased brother, Samuel; another portion to her brother, Joseph; and the remaining portion to her sister, Esther. As further evidence of her intention to equally distribute her estate to her next of kin, she provides that in the event of the death of Esther, in her lifetime, the share given her "shall be divided among the children of my deceased brother and sister equally." The bequest of a one-fifth of the residue of the estate to the children of the sister, Hannah, will be inoperative unless the word "children," as used, be extended beyond its ordinary sense, and be construed to mean "grand-children."

Ordinarily under a bequest to children, grand-children and other remote issue are excluded, but as long ago as Hallowell *vs.* Phipps, 2 Wharton, 376, it is held,

"under a bequest to children, grand-children and other remote issue are excluded, unless it be the apparent intention of the testator, disclosed by his will, to provide for the children of a deceased child. But such construction can only arise from a clear intention or necessary implication, as where there are not other children than grand-children, or when the term 'children' is further explained by a limitation over in default of issue. The word 'children' does not ordinarily, and properly speaking, comprehend grand-children, or issue generally. Their being included in that term is only permitted in two cases, viz: from necessity, which occurs when the will would remain inoperative unless the sense of the word 'children' were extended beyond its natural import; and where the testator has clearly shown by other words that he did not intend to use the word 'children' in the proper actual meaning, but in a more extensive sense."

This has become a fixed rule of construction. Hallowell *vs.* Phipps, and Dickinson *vs.* Lee, 4 Watts, 82, are approved in Horwitz *vs.* Norris, 49 Pa. 213, and Hunt's Estate, 133 Pa. 260. The rule is referred to approvingly in Barnitz's Appeal, 5 Pa. 264; Castner's Appeal, 88 Pa. 478; Steinmetz's Estate, 194 Pa. 611, McGlensey's Estate, 37 Pa. Sup. Ct., 514.

The question raised in this case was decided in Worrell's Estate, 25 Montg. 70.

The circumstances of this case, the facts shown, bring it within the rule that the grandchildren of Hannah Phipps are included from necessity in the term "children" in the bequest to the children of Hannah. They all stand in the same degree of consanguinity to the testator, and the one-fifth share or part of the residue of the estate is awarded to them per capita, following the statute of distributions. Act of June 30, 1885, 2 Stewart's Purdon, 2002, pl. 44.

ESTATE OF WILLIAM C. GORDON, DECEASED.

The cost of tombstones is not a part of the funeral expenses of a decedent and a preferred claim against an estate within the meaning of Act of February 24, 1834, Sect. 21, P. L. 76.

In the Orphans' Court of Montgomery County. No. 13, April Term, 1913. Adjudication.

A. H. Hendricks, Esq., for Accountant.

Joseph Knox Fornance, Esq., for Elwood Bernd, Creditor.

Solly, P. J., April 21, 1913.

William C. Gordon died February 10, 1911, testate. The account of the executor was filed February 27, 1913, showing a balance for distribution, proceeds of real estate, amounting to $42.04. The estate is insolvent. One of the items of credit is the payment to John L. Bechtel, undertaker, for funeral expenses, $129.13. This credit is disallowed and the amount thereof is added to the balance shown by the account.

The following claims were presented as preferred under the Act of February 24, 1834, Sec. 21. 1 Stewart's Purdon, 1103, pl. 110: Dr. William H. Corson, medical attendance during last illness, $85; Sophia Mergenthaler, nursing during last illness, $100.75; Elwood Bernd, tombstones furnished for grave of decedent at request of the executor, $44. No objection was made to the amounts of the claims. The allowance of the claim for tombstones as a preferred one was objected to. The bill for nursing is a preferred one. Larer's Estate, 11 Dist. Rep. 72; Liggett's Estate, 30 Co. C. R. 400.

A number of general claims which had been presented to the accountant were called to the attention of this court. The fund is insufficient to pay the preferred claims, and it is unnecessary to refer in detail to the claims of a personal nature.

The claim for tombstones is not a preferred one. A monument or a grave marker is no part of the funeral expenses of the decedent within the meaning of that term, under the 21st section of the Act of February 24, 1834, 1 Stewart's Purdon 1104, pl. 110. It is allowed as a general claim against the estate.

The tombstones were ordered by the executor. The testator gave no directions in his will as to his burial, or the erection of a tombstone over his grave.

If the tombstones ordered by the executor had been paid for by him, and the amount was reasonable, he would be allowed a credit for the expenditure, providing the estate was solvent. The expense of a suitable tombstone over the grave of a decedent is a legitimate item of credit

in the account of an executor, even where there is no provision on the subject made in the will of the testator. McGlinsey's Appeal 14 S. & R. 64; Porter's Estate, 77 Pa. 43; Webb's Estate, 165 Pa. 334. The latter case, relied upon by the claimant, does not decide that in an insolvent estate the executor will be allowed for an expenditure for tombstones, but merely that such an expenditure is proper, and a legitimate credit as against the legatees and distributees of the estate.

But where the estate is insolvent the cost of a tombstone is not a preferred claim, or debt, because it is no part of the funeral expenses. Moyer's Estate, 5 Kulp, 167. The reasoning of the opinion in that case is sound, and may be briefly stated in this way, that the debts of the decedent and the expenses of his burial must be paid before any part of his estate can be expended either to mark his grave, or to enclose the place in which his remains are buried. In Meyer's Estate, 43 Leg. Int. 108, the Orphans' Court of Philadelphia held that although not strictly to be considered as within the meaning of the term "funeral expenses," the cost of an appropriate monument or head and foot stone to mark the resting place of the dead, if warranted by all the surrounding circumstances, will be recognized as a proper expenditure and preferred under the Act of February 24, 1834; in the order of payment of debts. That is the only reported case I have been able to find which so holds.

I do not agree with the court in that case, notwithstanding the respect I entertain for the opinions of that Bench. I do not think "funeral expenses" within the true intent and the meaning of that term can be so interpreted as to embrace tombstones, or monuments to mark the graves of decedents. Every one is entitled to a decent burial. This the law recognizes. The expense of his burial, and the expenses for medicine furnished and medical attendance given the decedent during his last illness, are to be paid out of the estate, before any other debts are paid. Such expenses have the first preference, and if the estate is insufficient to pay them in full, they take proportionally what is left after the payment of administration costs.

The ascertained balance is awarded pro rata to the preferred creditors of the first class.

SKEER, ADMINISTRATRIX, ET AL. *vs.* LEHIGH VALLEY NATIONAL BANK.

Warrant of Attorney—Partnership—Act April 14, 1834, P. L. 354.

One member of a firm may sue in the name of the partnership to recover its assets against the consent of other partners whose natural alliances or interests as stockholders are with the defendant. In such a case a rule upon plaintiff for warrant of attorney from all will be discharged upon an indemnity against costs.

Ellen B. Skeer, Administratrix of Charles O. Skeer, deceased; E. P. Wilbur Trust Company, Robert E. Wilbur and Charles W. Anthony, Executors of Garret B. Linderman, deceased, Co-partners doing business under the firm name of Linderman and Skeer *vs.* The Lehigh Valley National Bank. In the Court of Common Pleas of Northampton County, No. 31 February Term, 1913. Rule of defendant upon counsel for Ellen B. Skeer, Administratrix, to file a warrant of attorney from the executors of Linderman whom they had joined as plaintiffs in the suit. Rule discharged upon indemnification against all costs and expenses.

E. J. and J. W. Fox, Edward Harvey, Robert B. Honeyman, for Plaintiffs.

Kirkpatrick & Maxwell, W. E. Doster, for Defendant.

OPINION AND ORDER OF THE COURT.

Scott, P. J. The argument of counsel upon these rules has proceeded further afield than I consider it necessary to follow. It has been suggested that unless decision is immediate the statute of limitations may bar further prosecution of the demand as pleaded in the statement of claim. Under the admitted facts I do not think so at all, but as that matter is not before me now I pass it without other observation than that the question need not be open for contention hereafter, as a brief discussion will be sufficient to dispose of the present motions.

Garret B. Linderman and Charles O. Skeer in the lifetime of each were partners as Linderman and Skeer. Both are now dead, the first named dying in 1885 provided by his last will and testament that the business of the partnership should be continued. Charles O. Skeer died in 1898, intestate. Some limited part of the firm business

was apparently continued until 1905 by the executors of Linderman and the administratrix of Skeer. Each one of these representative parties, however, had previously constituted by letter of attorney Garret B. Linderman, Jr., its agent in the management or liquidation of the original partnership.

The agent collected various sums of money, which were divided by him from time to time and paid over to the respective estates. The interest of Garret B. Linderman in the partnership was 19-28; of Charles O. Skeer 9-28.

Ellen B. Skeer, as administratrix, has filed a bill in equity (No. 1, November Term, 1912) against the executors of Garret B. Linderman, praying for an account of the business and assets of the late co-partnership.

On the seventeenth day of March, 1907, Garret B. Linderman, Jr., the liquidating agent, had on deposit in the defendant's bank to the credit of "Linderman and Skeer" a sum exceeding sixty-five thousand dollars ($65,000.00), against which account on that date he drew a check, of which this is a copy, to wit:

"No. Bethlehem, Pa., March 17, 1907.

Lehigh Valley National Bank

Pay to the order of Linderman and Skeer
Sixty-five Thousand Dollars,
$65,000. Linderman and Skeer
by Garret B. Linderman, Atty."

and endorsed the same "Linderman and Skeer
Garret B. Linderman Atty."

This action has been instituted to recover in the name of the representatives of the late firm the amount of this check, pleading as the cause of action that the defendant bank, having this money on deposit, knew that the drawer had no individual right or interest in the fund, and so knowing, appropriated the same to the payment of his personal indebtedness to said bank.

The defendant alleges that the suit of the plaintiff is for her sole individual benefit for misappropriation by Garret B. Linderman, as her agent, of the share in division of firm assets belonging to her, that she presented this claim against him in bankruptcy proceedings

by including it in an item for $107,210.34, and reasserted it by exhibiting her bill in equity (No. 1, November Term, 1912) against the executors of the senior member of the original firm, as I have hereinbefore stated it.

Now it is obvious that the demand in the equity proceedings is not that which is stated as the cause of action against this defendant, nor for that sum then on deposit to the credit of Linderman and Skeer, except as the amount thereof may be incidentally involved in the account, if decreed to be taken, between the personal and legal representatives of the original members of that firm. The complainant charges in the bill a large overpayment to the Linderman executors of assets collected.

If the liability of the defendant bank can be established in the present suit to repay the amount of the check, it is recovered either for division as firm assets according to the proportion mentioned; or if Mrs. Skeer has the sole beneficial interest therein, it is recoverable in the partnership name for her use, unless there had already been a division of the funds by the attorney as her agent, and this amount separately set apart for her. But the bank account was in the name of the late firm, and prima facie, at least, assets in the liquidation. Thus the present representatives of that firm are not only proper parties plaintiff, but, it seems to me, necessary ones if the money is to be recovered at all either from this defendant or from the defaulting agent. I am expressing no opinion upon the ultimate liability of the bank.

To require a warrant of attorney from the protesting representatives of one of the partners, whose interests or natural alliances are with the defendant and one of them is its vice-president, would operate effectually as a permanent injunction against the prosecution of this suit. Nothing has been disclosed in petition and answer, and nothing suggested in argument that would authorize Mrs. Skeer as administratrix of her intestate, to sue the defendant bank; nor is there anything in the facts as they are now known that would constitute a cause of action by her alone against the liquidating agent of both estates.

The executors of Dr. Linderman object to being made parties plaintiff, although as representing a partnership and a distinct legal entity, they are in no sense personal suitors. If without some decree of court they might thus

occupy an apparently hostile attitude towards the bank of which they are stockholders, and be legally liable for costs in the event of an unsuccessful prosecution of the suit, they are protected by an order of indemnity against all mischances.

The rule is thus stated in Lindley on Partnership: "A partner may sue in the name of himself and co-partners without their consent; but if he sues against their consent he must indemnify them against the costs. So one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he act against the will of the other partners." (Vol. 1, *p. 271.)

An order separately filed, discharging the rule for a warrant of attorney, embraces by its operation and in its effect decision of the entire present controversy.

COMMONWEALTH *vs.* FRASSO.

Constitutional Law—Title of Act—Act 11 June, 1911, P. L. 1060.

The Act 11 June, 1911, P. L. 1060, does not violate Art. III, Sec. 3 of the Constitution as being defective in title.

The title "To provide for licensing and regulating private banking in the Commonwealth of Pennsylvania; and providing penalties for the violation thereof," plainly indicates the purpose of the Act 11 June, 1911, P. L. 1060, and fairly gives notice of the exemptions in Sec. 8.

Constitutional Law—Effect of Unconstitutionality of a Part of Statute.

If the exemptions in Sec. 8 of the Act 11 June, 1911, P. L. 1060, should be held unconstitutional in that they violate Clause 27, Sec. 7, of Art. III of the Constitution of Pennsylvania, the rest of the Act is not affected because there still remains an intelligent piece of legislation capable of enforcement, in harmony with the obvious legislatve intent.

Note: Question whether the sixth exception in Sec. 8 of the Act 11 June, 1911, P. L. 1060, is unconstitutional not decided.

In the Court of Quarter Sessions of Berks County. No. 109 December Sessions, 1912. Rules by defendant for arrest of judgment and for new trial.

Joseph Hill Brinton and Wilson S. Rothermel for Defendant and Rules.

William Kerper Stevens for Commonwealth.

Opinion by Wagner, J., April 15, 1913. The defendant was convicted of violating the provisions of the Private Banking Act of June 11th, 1911, P. L. 1060. At the trial defendant's defence was that he fell within Exception 6, Section 8, of the act, in that he had conducted the business of private banking for a period of seven years prior to the approval of this act and was not engaged in the sale as agent or otherwise of railroad or steamship tickets. That the defendant had been in the business of private banking for a period of seven years prior to the approval of the act was not disputed. The Commonwealth contended that he was engaged in the sale of steamship tickets and therefore was not exempt from the requirements of the act. Testimony was submitted on the part of the Commonwealth and on the part of the defendant bearing upon this disputed question as to whether or not the defendant was engaged in the sale of steamship tickets. In finding the defendant guilty the jury must have found that the defendant was so engaged.

The motion for arrest of judgment is based upon the claim that the act is unconstitutional. In the examination of this it must be borne in mind that " 'Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger:' Sinking Fund Cases, 99 U. S. 700; Powell *vs.* Penna., 127 U. S. 678 (8 Superior Ct. Repr. 992, 1257); Sugar Notch Boro., 192 Pa. 349;" Commonwealth *vs.* Pflaum, 236 Pa. St. 294, 297, 298. It is conceded by defendant that the regulation and inspection of private banks unquestionably falls within the police powers of the state. Commonwealth *vs.* Brinton, 132 Pa. St. 69; Commonwealth *vs.* Jones, 4 Pa. Sup. Ct. 362; Commonwealth *vs.* Wilson, 6 Dist. Rep. 628; Commonwealth *vs.* Hanley, 15 Pa. Sup. Ct. 271; Commonwealth *vs.* Clymer, 217 Pa. St. 302, 303; Commonwealth *vs.* Densten, 217 Pa. St. 423; In re Registration of Campbell, 197 Pa. St. 581; Musco *vs.* United Surety Co., 90 N. E. Rep. 171, clearly establish this power.

Defendant contends that the title of the act violates the provision contained in Sec. 3, Art. 3, of the Constitution, that "No bill, except general appropriation bills,

shall be passed containing more than one subject, which shall be clearly expressed in its title." He claims that the title does not give fair and reasonable notice of the contents of the act, or, rather, that it fails to give notice of the exceptions therein. In Reber's Petition, 235 Pa. St. 622, the Supreme Court, on page 631, says: "Under the constitutional requirement the purpose of the title is merely to give warning to the public and to the legislators of that which may actually be found in the body of the act, so as to lead to further inquiry. It is to the contents of the statute only that the title is required to point, and not to its results." Also in Minsinger *vs.* Rau, 236 Pa. St. 327, on page 336, we have: "A title need not be an index; it must not be misleading, but if it fairly gives notice of the subject and substance of an act, it is sufficient. A short general comprehensive title is more desirable than a long one which attempts to point out all the details of a statute. If there are provisions not covered by the title, they do not affect the validity of the act as a whole unless they are vital in character and it is apparent that without them the lawmakers would not have enacted the legislation."

The title of this act is: "To provide for licensing and regulating private banking in the Commonwealth of Pennsylvania; and providing penalties for the violation thereof." This plainly indicates the purpose and intent of the act. The act does not contain any provision that would not naturally fall within an act having as its object that declared to be the purpose as found in the title of this act. In Commonwealth *vs.* Jones, supra, on page 370, we have: "It is not necessary that the title should refer specifically to matters legitimately implied from its purpose as indicated by the title." See also In re Registration of Campbell, supra, page 588. If defendant's position that the title does not give notice of the exemptions could be upheld, we consider that the effect thereof would be that it would merely invalidate that exemption upon which, at the time of the trial, the defendant based his defence. In the case of Commonwealth *vs.* Hanley, supra, on page 281, we have: "Where the title of an act does not fully express its subject, the general rule is that only those provisions of the act not covered by the title are void: McGee's Appeal, 114 Pa. 470; La Plume *vs.*

Gardner, 148 Pa. 192." We do not consider that defendant's contention of the unconstitutionality of the act by reason of defective and insufficient title can be sustained.

Defendant's other claim is that the entire act is unconstitutional because the exemptions contained therein violate Clause 27, Sec. 7, Art. 3, of the Constitution. Even if this defendant, who, at the time of the trial, planted his whole defence upon one of these exemptions, can raise this question, and even if they be unconstitutional, does that then render the entire act so or does it merely, by wiping away the exemption upon which the defendant relied for his defence, bring him within the other portions of the act? The act is aimed at the evils arising from irresponsible persons engaging in the business of private banking. The object of the act is to permit only responsible persons or persons under bond to engage in this business. The wisdom of the act is plain. With that wisdom, however, we have nothing to do in determining the constitutional questions: Reber's Petition, supra, page 632. We consider that this case falls under the rule laid down in Wood *vs.* Philadelphia, 46 Pa. Sup. Ct. 573, pages 582, 583; "The power of the courts to declare invalid an act of the Legislature is a necessary but delicate one, and is and ought to be exercised only when, and so far as, obedience to the fundamental law requires. It is doubtless true that when the excision of the invalid portion of a statute leaves but a mutilated remnant that cannot be enforced, the entire statute is of necessity gone, or even where what is left might be capable of enforcement, and yet this would result in producing a condition at variance with the whole scope and purpose of the statute as enacted, again the destruction of the whole would follow. But if, on the other hand, after cutting off the unconstitutional clause or section there still remains an intelligent piece of legislation, capable of enforcement, in harmony as far as it goes with the apparent legislative intent, it is the plain duty of the courts to permit such portion of the act to stand. The familiar principle is thus stated in Rothermel *vs.* Meyerle, 136 Pa. 250, one of the many cases on the subject: 'A statute may be void only so far as its provisions are repugnant to the constitution; one provision may be void, and this will not affect other provisions of the statute. If the part which is unconstitu-

tional in its operation, is independent of, and readily separable from that which is constitutional, so that the latter may stand by itself, as the reasonable and proper expression of the legislative will, it may be sustained as such.' " See also Commonwealth *vs.* Percival, 11 Pa. Sup. Ct. 608; Minsinger *vs.* Rau, supra, 336.

Even if the exemption upon which this defendant relied for his defence be unconstitutional, yet we do not consider that it affects the other parts of the act. We still have a complete, entire act, capable of enforcement and fully sufficient to remedy the evils intended by the legislators to be done away with when they passed it. It seems clear from a consideration of those cases just cited that at least the main provisions of this act must be preserved. In view of this it is not necessary, for the determination of this present case, to consider whether or not the exemption in question is unconstitutional or not, because, if unconstitutional, defendant's only defence is taken away from him and he falls under the general provisions of the act.

The defendant has also filed three reasons in support of his motion for a new trial. The first, that the verdict is against the law, has been passed upon in considering the constitutionality of the act. The other two reasons, that the verdict is against the evidence, were not pressed at the time of the argument for the evident reason that the conclusion arrived at by the jury was fully supported by the evidence submitted.

Rules for arrest of judgment and for new trial are discharged.

COVER *vs.* CONESTOGA TRACTION COMPANY.

Personal Injury to Brakeman—Fellow Servant—Assumed Risk—Safety of Appliances.

Where a brakeman for a trolley company was injured by being jolted off of the bumper of a car where he was standing with his hands on the upright break-wheel because of the sudden application of power on an attached car pushing his car up hill, which also broke the coupling bolts, he cannot recover damages if the action of the motorman caused the accident, as the latter is a fellow-servant.

Where an accident results from an unforeseen cause, not discoverable in advance of its occurrence, with no visible defect in any part of

the machinery and no knowledge of any defect on the part of the men who were constantly using the machinery, or of the employer, the accident is one of the ordinary risks of employment which the servant takes upon himself.

An employer performs his duty when he furnishes appliances of ordinary character and reasonable safety, and the former is the test of the latter.

In the Court of Common Pleas of Lancaster County. No. 30, December term, 1906. Rule to take off non-suit.

C. E. Montgomery, for Rule.
W. U. Hensel, Contra.

April 19, 1913. Opinion by Landis, P. J.

The statement filed by the plaintiff charges that he was "violently thrown between the cars by the breaking and giving way of a bolt or bolts used in the construction of the coupling or couplings between the south end of the empty car and the north end of the loaded car, or because the couplings were improperly constructed and unsafe, or by reason of the bolt or bolts used in the construction of the coupling or couplings between the south end of the empty car and the north end of the loaded car being defective, or being insufficient in size, or weight, or strength, or both, whereby plaintiff was seriously and permanently injured." These claims are the only ones made by the plaintiff, and, of course, upon them the case must be considered. Whether or not negligence was shown or offered to be shown upon the trial, or whether the plaintiff was guilty of contributory negligence, are the questions now before the Court.

On April 18, 1906, the plaintiff was working as a brakeman for the Conestoga Traction Company on its Quarryville division, near a place called Musser's quarries, and he had been so employed for five days preceding the accident. He had had five and a half years' experience as a fireman on a railroad. At these quarries, which were upon a siding not far from the main line, stone was crushed, and cars, placed under a crusher, were filled with broken stone and then taken out upon the main line and carried to their destination. On the day in question, a car, filled with crushed stone, was standing under the crusher. A motor and an unloaded car came from the south, and backed in upon the siding, whereupon the loaded car was attached, and all three were moved out

over the siding, the plaintiff being on the bumper at the rear end of the empty car, next to the loaded car. Having passed the switch, they were backed southward, up a slight grade, and the plaintiff testified that, in doing this, extra force was twice applied, whereupon certain bolts gave way, and he was dropped between the two cars and his left knee was crushed. He said that the second application broke the bolts, "and the jar and the drop was one." The empty car was about eight feet long and five feet wide. There was a box around the platform, fourteen inches high, and the sides were on hinges, so they could be dropped. There was an upright wheel-brake outside the box, three and a half inches away from it, sufficient to allow the dog or ratchet to revolve. This ratchet held the brake when locked. There was an iron extending from the end of the car, but whether it went through the floor the entire length, the plaintiff could not say. To the iron was bolted another piece, in the shape of an "S," where the draw bar was put in. The first piece was bolted ten inches from the end of the car, under the platform, with bolts, and the plaintiff also testified that it extended back one and a half or two inches farther than the bolts. The bolts were one-half inch thick, and there were two at each coupling. From the testimony, it is somewhat difficult to understand just what this construction was, particularly by those unskilled in devices of this character. The plaintiff was familiar with the operation of railroad trains, and also with the manner of making and taking switches. He says he was standing on the bumper of the empty car, with his foot against the dog and his hand on the brake. He was there and set the brake when they came out of the siding, and, while the switch was being turned, he released the dog. After that, he had nothing to do, until the car should be stopped to switch the empty car into the quarry. He was not told to occupy this position, and it did not appear that he was performing any duty there at the time the accident occurred. He said that, after the second application of force, "I just tripped as you would slip on a banana peeling;" that it was the banging of the two cars together that caused the injury.

George C. Shimpf, a witness called by the plaintiff, stated that he was acquainted with the construction of

couplings of different cars and makes, but that he did not understand the coupling of this car; he had never seen it; he did not know whether cars of this kind were used in this community; and he said that the various makers of cars made different cars and all had different designs. He never saw a draw-head constructed like the one described, and he said that all that he had seen were solid bars, welded. But he also frankly stated that he would not be able to pass upon the construction of the car, unless he saw it. He was then asked to express an opinion as to whether or not the construction, as described, was a safe construction, and questions to this effect were disallowed because I thought that the witness, under the law, was not in a position to give such an opinion. However, in the present proceeding, they must be considered as answered by him, and the case must be discussed from that standpoint.

In the first place, I do not see what the breaking of the bolts had to do with this accident. It must be remembered that the motor was pushing the cars up hill, and the bumpers of the two cars, or whatever connected them, were in such a position as to enable the force to be applied to the rear car. It was not proven that the breaking of the bolts threw the plaintiff between the cars. The jar from the two applications of force was the act of the motorman, and the plaintiff must have been thrown by it between the cars before the bolts broke, or he would not have been thus caught. The proximate cause of the accident, according to this theory, would have been the sudden application of force in operating the car, which, at the same time, threw the plaintiff off the bumper and broke the bolts. The proximate cause of the accident would not then, be the breaking of the bolts, but the manner in which the car was operated. There was no evidence in this case that the couplings or brakes, or indeed anything connected with the car, were out of repair, nor that they were any different from those generally used. There were no defects in them, so far as could be observed, and neither the employer nor the employee knew that they were insufficient. Each had an equal opportunity of ascertaining that fact, if such it was. That they were sufficient for ordinary purposes is evident from the fact that they had been used in the same manner

by the same employees for a number of days preceding, and from the testimony of the plaintiff himself it can be fairly concluded that they were sufficient for the purposes for which they were used, if not overtaxed. If the accident occurred by reason of the motorman having, in an unnecessasry and extraordinary manner, jarred the car, by reason of which the bolts were broken, the plaintiff could not recover, for the motorman was a fellow-servant of the plaintiff, and for such negligence the defendant was not responsible. "To constitute two persons fellow-servants, it is sufficient if they are in the employ of the same master, engaged in the same common work, and performing duties and services for the same general purpose:" Spees *vs.* Boggs, 198 Pa., 112. And "a recovery of damages cannot be had by an employee from his employer, for an injury caused by the negligence of a co-employee, engaged in the same common work and performing duties and services for the same general purposes:" Duffy *vs.* Oliver Bros., 131 Pa., 203; Shank *vs.* Edison Electric Illuminating Co., 225 Pa., 393.

It has been decided that, "where an accident results from an unforeseen cause, not discoverable in advance of its occurrence, with no visible defect in any part of the machinery, and no knowledge of any defect on the part of the men who were constantly using the machinery, or of the employer, the accident is one of the ordinary risks of the employment which the servant takes upon himself:" Bradbury *vs.* Kingston Coal Co., 157 Pa., 231; O'Dowd *vs.* Burnham, 19 Sup., 464. If, then, there was no visible defect in the brake, or draw-head, or bolts, the defendant would not be liable for an unforeseen accident.

Again, the law as to proper appliances is well settled. "An employer performs his duty when he furnishes appliances of ordinary character and reasonable safety, and the former is the test of the latter. For, in regard to the style of the implement, or the nature of the mode of performance of a work, 'reasonably safe' means safe, according to the usages, habits and ordinary risks of the business:" Titus *vs.* Bradford, etc., R. Co., 136 Pa., 618. "It is not an accurate definition of the duty of a master to his servant to say that he must furnish 'a safe place to work and safe tools with which to work.' Employers are only required to

furnish a reasonably safe place in which, and reasonably safe tools with which, to work:" Powell *vs.* American Sheet and Tin Plate Co., 216 Pa., 618; Welch *vs.* Carlucci Stone Co., 215 Pa., 34. In the Phila. and Reading R. Co. *vs.* Hughes, 119 Pa., 301, it was held that "the duty of a railroad company to exercise ordinary care in providing and maintaining cars that are safe, and suitable appliances and machinery to be operated by their employees, does not require the adoption of the best machinery which can be procured or that which combines the latest devices or improvements, but such only as is reasonably safe and in common use;" and in Payne *vs.* Reese, 100 Pa., 301, that "an employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required from the employer." In Cunningham *vs.* Fort Pitt Bridge Works, 197 Pa., 625, it was held that "the party charging negligence does not show it by showing that the machinery was not in common use. If it should be so held, the use of the newest and best machine, if not yet generally adopted, could be adduced as evidence of negligence." It is important for the plaintiff to show that "the method used by the defendants was unusual, and was more dangerous in itself than the ordinary method:" McGeehan *vs.* Hughes, 217 Pa., 121. The ground of liability is not danger, but negligence, and the test of negligence, in respect of machinery, is the ordinary usage of the business: Ford *vs.* Anderson, 139 Pa., 261.

In Mixter *vs.* Imperial Coal Co., 152 Pa., 395, a brakeman brought suit to recover damages on the ground that the brake was out of order at the time of the accident, and that the plaintiff was thereby unable to control the car, so that it ran away with him. It was held that this was insufficient in itself to establish the negligence of the master. In Titus *vs.* Bradford, etc., R. Co., supra, the action was for the death of a brakeman, and the negligence complained of consisted of the use of a particular broad-gauge car body upon a narrow-gauge truck. The carriage of such cars was a part of defendant's ordinary

business, and cars like this had been often carried. It was held that, in the absence of proof that the carrying of this car was an unusual occurrence, and the plaintiff's testimony showing that the brakeman accepted his employment with knowledge of the practice, he could not recover. In Clark *vs.* Garrison Foundry Co., 219 Pa., 426, an employee was injured by the blowing out of a stopcock of a whitewashing machine operated by compressed air; there was no evidence whatever of any defect in the construction or material of the machine, and nothing to show that it was worn or in any way out of repair. It was held that the employee could not recover against his employer. In Sandt *vs.* North Wales Foundry Co., 214 Pa., 215, the evidence failed to disclose any defect in the appliances used, or, if any defect existed, it must have been seen by the plaintiff. It was held that, "of the several theories advanced for the cause of the accident, one was as plausible as the other; and that, if the case were left to the jury, the verdict would be a mere guess as to the real cause." In Hemscher *vs.* Dobson, 220 Pa., 222, a girl of fourteen years had her hand caught in a machine at which she was working, by reason of its suddenly starting up. The plaintiff had worked upon the reel from eight days to two weeks and she appeared familiar with it. The accident was due solely to the starting of the machinery, and there was no testimony that the employers were in any way responsible for the starting, or had any knowledge or reason to anticipate that it was liable to start of its own accord. It had never done so before. A judgment of non-suit was entered. In Simpson *vs.* Pittsburgh Locomotive Works, 139 Pa., 245, the plaintiff's husband was killed by the bursting of an emery wheel. There was no evidence showing what caused the emery wheel to burst, that it was improperly set up, or that there was any defect in it which was known or which might by reasonable diligence have been known to the defendant company. It was held that the plaintiff could not recover. See, also, Augerstein *vs.* Jones, 139 Pa., 183; McAvoy *vs.* Penna. Woolen Co., 140 Pa., 1. In Alexander *vs.* Pennsylvania Water Co., 201 Pa., 252, in an action by a servant against a master to recover damages for personal injuries caused by an alleged defective portion of a pump, it was held to be error "to submit the case to the

jury, where there is no proof of what caused the accident, and mechanical experts testify that the accident might have resulted from several causes, and all that plaintiff relies upon is, a mere assumption on his own part that the alleged defective portion of the pumps was so constructed under the supervision of the defendant's general superintendent that it was not able to stand the pressure to which it was subjected. Where the plaintiff's case . . . rests wholly upon a supposable theory, not supported by established facts, and from the same facts three other just as probable theories are deducible, and neither one of them imputes liability to the defendants, there can be no recovery. To permit it would be to allow a recovery on mere proof of an accident."

Therefore, upon this consideration of the facts of this case and the law which I am of opinion is applicable to it, I have concluded that it was proper to enter a judgment of non-suit. I do not think anything has been advanced to warrant a different conclusion, and, for this reason, the rule is now discharged.

Rule discharged.

RAPHAEL AND ZEUGSCHMIDT *vs.* SALTZER, ET AL.

Case Stated—Exemption of Bankrupt Debtor Under the Act 9 April, 1849.

Where a case stated is submitted with authority to enter judgment for or against one of the parties who is not a party to any case in court and who is not an applicant to take any money out of court that has been paid into court by a stakeholder, such attempted submission is irregular and a case stated under such circumstances will be quashed.

Where a bankrupt debtor claims his exemption under the Act of 9 April, 1849, he must select it from property owned by him and he cannot, by agreement with his trustee, omit such selection and claim the amount of his exemption from the proceeds of the property after its sale.

Where a case is stated in an attachment execution proceeding to determine the right to a fund between an attaching creditor and one who claims by assignment from the bankrupt debtor, which fund is the $300.00 exemption allowed the debtor, but it is not shown by the agreed facts that the bankruptcy court had set apart the fund to the bankrupt, the court is without power to enter judgment, for, until the exemption is set apart by the bankruptcy court, the fund is in the hands of the trustee like other assets of the bankrupt's estate and answerable to the bankrupt's debts.

In the Court of Common Pleas of Westmoreland County, No. 578 February Term, 1912. Case stated between an attaching creditor of a bankrupt debtor's exemption of $300.00 under the Act of 9 April, 1849, and the Executor of James A. Pearce, deceased, who claims the exemption by assignment from the bankrupt debtor.

Marker & Hollingsworth, for Plaintiff.
Moorhead & Smith, for Trustee in Bankruptcy, Garnishee.
Beacom & Newill, for Pearce Estate.

McConnell, J. The pending case is of such intrinsic nature that it would require the Court, in disposing of it, to ascertain whether the Garnishee has in his hands $290 belonging to the defendant, A. C. Saltzer, which the plaintiffs are entitled to have awarded them by virtue of the service of the attachment execution. The disposition of a case of that kind would, in nowise, involve the possibility of rendering a judgment against any one else than the Garnishee or the plaintiffs. The case stated, however, does contemplate such a possibility. James A. Pearce, in his life time, and his executor since his decease, was not a party to the pending action of attachment, and did not ask leave of court to intervene therein. Yet the case stated seeks to have the court render a judgment for or against him.

We can understand the possibility of Saltzer's affecting the right of the plaintiffs in the attachment to have the whole fund, by reason of his having transferred $200 of it to Pearce, before the attachment execution was served. We can understand that if Pearce, by an anterior and superior right, is entitled to $200.00 of the fund, it should not, in this attachment proceeding, be found to belong to the plaintiffs. The plaintiffs should have nothing by this attachment proceeding except what was legally Saltzer's, at the time of the service of the attachment. The estate of Pearce, by virtue of an accepted order, claims $200.00 of the money now in the hands of the trustee, and the plaintiffs also claim the same $200.00 through the attachment execution. Of course, in determining the right of the plaintiffs in this attachment execution, it would be essential for them to show that, at the

time of the service of the attachment, the money claimed belonged to the defendant, and not to another—and, in making that showing, the alleged title of Pearce would necessarily become incidentally involved, but not in such a way as to make it possible for the court, in this attachment proceeding, to render any judgment for or against Pearce, as if he were a party to the proceeding. The thing we do not understand with respect to the end aimed at in the case-stated, is how we can, by such a case-stated, become invested with the legal right to herein render such a judgment. The attempted submission provides: "If the Court be of opinion that the assignment made by A. C. Saltzer to James A. Pearce was a good and valid assignment, then judgment to be entered for E. C. Pearce, Executor of James A. Pearce, for the sum of Two Hundred ($200.00) Dollars, and for Raphael & Zeugschmidt for the sum of Ninety ($90.00) Dollars. If, on the other hand, the Court be of the opinion that the attachment is a good and valid attachment, and the assignment invalid, then judgment to be entered for Raphael & Zeugschmidt for Two Hundred Ninety ($290.00) Dollars."

But how can we, in any event, enter any judgment for Pearce, who is not a party in the case? How can he intervene in a pending issue in which he is not a party, and submit it to the court? And if it should appear from the facts agreed upon, that neither Pearce nor the plaintiffs have shown legal right to the money, we are, by the case-stated, given no authority to enter a judgment appropriate to the ascertained lack of legal right in them. The parties to this case-stated are the plaintiffs in the attachment execution and E. C. Pearce, Executor of James A. Pearce, who is not a party to the attachment execution. "In a case stated, it must appear that there is an action, amicable or otherwise, pending between the parties; and that the dispute between them is real and not merely colorable and suggested only in order to have the law ascertained. In other words, there must be presented an issue over which the court has jurisdiction, and which can appropriately be settled by its judgment." 2 P. & L. Dig. Dec. col. 2491. The submission attempted to be made is not made by the parties to this pending attachment case—only one of them, the plaintiffs, being parties in the pending case.

There is no authority anywhere for persons, other than the parties ot the suit, submitting a case-stated with respect to any issue therein, yet this submission purports only to be made in behalf of the plaintiffs and one who is an entire stranger to the pending suit. To engraft such a proceeding on an attachment execution is to make a new case, and not to submit the issues of the old one, as they stand between the parties thereto. "A conveyed to B, who, on the same day, conveyed back to A's wife. A judgment against A was revived without notice to any terre-tenant, and execution thereon was stayed by the court. A case-stated was then agreed upon between A's wife and the judgment creditor. Held, there was no action pending between the parties, and the case must be dismissed." Smith *vs.* Eline, 4 Dist. 490.

The money involved in this case-stated has not been paid into court, so as to thus be placed in a position wherein it might become accessible to claimants other than the parties to the pending action. There is no agreement that the money should be treated as if paid into court. "In an issue framed to determine a landlord's right to a year's rent out of the proceeds of a sheriff's sale, the money was not paid into court, nor was it agreed by the case-stated that it should be treated as if so paid. A judgment for plaintiff having ben entered, held, there was no case before the court for consideration and, a writ of error was quashed." Gray *vs.* McFall, 1 Mona. 176; Matthes *vs.* Hoffman, 2 Mona. 1. "In order that a binding judgment may be entered on a case stated, there must be a pending suit in court, instituted either adversely or by amicable action, and the court must have jurisdiction of the parties." 10 P. & L. Dig. Dec. 803.

Where it does not appear that an action is pending, the case stated will be quashed. Dougherty *vs.* Cumberland County, 22 Sup. 591; Hofer *vs.* McKelvy, 23 Sup. 202; Altoona *vs.* Morrison, 24 Sup. 417. There is no case pending between Raphael & Zeugschmidt of the one part and the executor of James A. Pearce of the other part, yet a case-stated is here submitted by them for decision, with authority to enter judgment for or against Pearce's Executor, who is not a party to any case now in court, and who is not an applicant to take any money out of court that has been paid by a stakeholder. Only the parties to

a pending issue can efficaciously submit it. Such a submission as is here attempted is irregular. We must have a pending issue between the parties submitting not merely a desire to have some mooted questions of law, in which they may be both interested, decided—before we can authoritatively deal with a case-stated. The judgment that this case-stated authorizes is essentially different from the judgment that must be rendered in the case pending between the parties to this record. The pending issue is not at all the one submitted for decision in the case stated.

There is no pending issue between the parties who undertake to submit a case-stated. Only the parties to a pending case can submit the case on an agreed state of facts. Therefore, this case-stated must be quashed.

It is extremely doubtful whether, considering only the facts embodied in the terms of the case-stated, either of the claimants has shown a right to have the $200.00 or the $290.00 referred to in the case-stated. It is entirely clear that unless the defendant, A. C. Saltzer, has been legally invested with the right to the $290.00, by having it set aside to him by the Bankrupt Court, it yet remains under the control of that Court, and there is, therefore, no fund for claimants to dispute about. The money is not in A. C. Saltzer's hands, and never has been. It was not an item in his estate, when he was adjudicated a bankrupt. Whether it ever will be his in legal right—is dependent on the legally authorized action of the Bankrupt Court. Of course, that court cannot administer the fund, if it once comes into existence, and determine the questions of conflicting claims to it, such as we have here; but it is its exclusive function to set aside to a bankrupt his exemption and determine his right to have it set aside. Until that Court has taken action in the premises, there is no fund accessible to the claim of one who seeks the fund as the assignee thereof, through the instrumentality of a voluntary order given by the defendant and an acceptance thereof by the Trustee, or accessible to one who seeks by the adverse proceedings of attachment execution to effect what is, in its essential nature, an assignment thereof. Although the time of the incipiency of the right of a voluntary assignee may be somewhat different from the time when a compulsory assignment by attach-

ment execution can have its incipiency, (Patterson *vs.* Caldwell 124 Pa. 455); yet, in the end, both kinds of claimants, if successful, occupy the status of assignees. Of course, to make the status of either a fruitful one, it is essential that there be a legally existing fund capable of assignment by the debtor. It is essential to both claimants that the case-stated demonstrate the existence of the fund upon which their alleged rights respectively operate. It is not clear to us that the case-stated shows this indispensable requisite. The exemption claimed to be subject to both the voluntary assignment and the adverse attachment execution is the exemption allowed a debtor by the Pennsylvania Act of 9 April, 1849, P. L. 533. "Under the Act of 9th April, 1849, a debtor is not, under any circumstances, entitled to $300.00 of the money raised by a sheriff's sale of his personal property. The act confines him to an election of the goods he desired to retain; and such election may be in time if the party do not wait so long that a compliance with his request would postpone the sale. His right of election is gone if he waits till the sale was begun." Hammer *vs.* Freese, 19 Pa. 255. In the course of the opinion, Chief Justice Black, p. 257, says, inter alia: "We are of the opinion that a debtor cannot, under any circumstances, entitle himself to $300 of the money for which his personal property sells, at sheriff's sale. The Act speaks of property, not money. It requires him to elect the goods he wishes to retain and have them appraised; and property thus chosen and appraised shall be exempt from levy and sale. This excludes the idea that he is to have his choice between retaining the property and demanding money out of the proceeds." This case is followed by many others of like tenor. This Act does not, ex vi termini, set aside $300.00, or $300.00 worth of property, to a debtor. The move is with him. He must claim his exemption, and if he do, the procedure is as therein prescribed. If he do not claim it, his right is gone, and all his property is made to subserve the exigencies of the writ against him. The Bankrupt Act simply incorporates in it that exemption which the state law allows. The federal courts follow the construction placed on the exemption law by the Pennsylvania courts. "The federal courts, sitting in Pennsylvania, have followed the law as laid down by the courts of that

state." Wright *vs.* Wright, 103 Fed. 580. "Courts of bankruptcy, in setting apart to bankrupts the exemption allowed by the laws of the state, must proceed in accordance with such laws; and where the law of the state exempts from execution personal property of a certain value, to be selected by the debtor, it is not permissible to allow the bankrupt to select a trifling amount of personal property, and receive the entire difference in cash, from the trustee." In Re Woodward, 95 Fed. 955. Yet this thing that is not permissible is the only source from which the debtor in this case, is to get legal control of the $290.00 that the claimants seek to have. Their right to it can rise no higher than the defendant's. Does it appear in the case-stated that there is any fund legally subject to appropriation by claimants? "Under the law of Pennsylvania a debtor must select his exemption of $300.00 from the property owned by him, and a bankrupt in that state cannot, by agreement with his trustee, omit such selection, and claim the amount of his exemption from the proceeds of the property after its sale." In Re Haskin, 109 Fed. 789. In the course of the opinion by Judge McPherson, (a former judge in the state courts and entirely familiar with the nature of the exemption under the Act of 1849,) says: "When, therefore, the bankrupt and the trustee agreed that the bankrupt should retain household goods to the amount of $127.25, and that the balance of the $300.00 should be paid 'in cash, as realized by the trustee in bankruptcy upon a sale of the effects of the said bankrupt'—they were making an agreement which, as to the balance, is unlawful, and cannot be enforced." If an agreement of that kind is unlawful and cannot be enforced in that case, what better right in the debtor is shown in this case?

The thing in the case-stated that is depended upon to show the existence of the fund and the character thereof, is the following paragraph: "A. C. Saltzer, the above named defendant, having been declared a Bankrupt, claimed as his exemption under the laws of Pennsylvania certain goods and chattels. It appearing afterwards that the goods claimed amounted to more than the defendant was entitled to, under the exemption laws, it was, therefore, agreed before the Referee in Bankruptcy that all of the goods, except a watch valued at $10.00, should be

sold by the trustee in Bankruptcy, and that the balance of defendant's exemption, to wit, $290.00, should be allowed him in cash, out of the proceeds of the sale of the goods claimed." The substitute for the course that the law marked out is an agreement made—by whom it does not appear—before the Referee in Bankruptcy. It is not said that the Referee directed that course or, in any wise, was one of the agreeing parties. As shown in Re Haskin 109 Fed. 789, an agreement between the debtor and the Trustee in Bankruptcy, undertaking to allot the debtor the proceeds of property, instead of the property itself, as and for his exemption, is unenforceable. Who, then, are the parties legally qualified to make an agreement of that kind that is legally enforceable? The paragraph quoted does not state. That the agreement, when made, would be something else than what the law prescribes is entirely clear. If the property was not claimed and set aside in the manner prescribed by the act, it remained a part of the debtor's estate answerable to any execution process against him, and, from the authorities above quoted, it is to be presumed that the same would be held in the United States Court. Although the basis of the legal right to have the exemption is in the act of assembly, yet that right is to be exercised in the manner designated by the donative act. It is incumbent on the claimants to show by their case-stated that the defendant had had legally set aside to him, out of the bankrupt estate, the $300.00 exemption that the act of 1849 and the act of Congress give to him when legal procedure is followed. As stated, the paragraph quoted does not say that the Referee in Bankruptcy, as and for the act of the Bankrupt Court, set aside $290.00 in cash produced from the sale of the Bankrupt's personal property, as and for his exemption—and, from the authorities cited, it does not seem probable that the Bankrupt Court would so decree. It is important for us to know that the thing agreed upon before the Referee in Bankruptcy was made by those who had power to give it legal efficacy—and this we do not know, without our being informed as to who the contracting parties were. We know that an agreement of that kind between the debtor and the Trustee would be lacking in legal efficacy. If it was not an agreement at all, but an order of the Referee, we ought to be informed of

that fact. Who had legal power to give to the defendant, as a part of his exemption, $290.00—the proceeds of the sale of some of the Bankrupt's estate? It remained a part of that estate unless legally separated therefrom by a recognized course of procedure. "Property set apart to a bankrupt as exempt is liable to be sold, prior to the bankrupt's discharge, on an execution issued upon a waiver judgment obtained prior to filing a petition in bankruptcy." Lockwood *vs.* Erech Bk. 190 U. S. 294. Once the exemption is individuated and set apart by proper authority from the bankrupt's estate, it becomes answerable for his debts, if the character of the debts is such as to be superior to the right to exemption. It is the exclusive right of the United States Court to pass on the Bankrupt's right to exemption. "The bankruptcy court has jurisdiction, and the jurisdiction is exclusive, to determine the claims of bankrupts to their exemptions. Sec. 2, subd 11, of the Bankruptcy Act confers the express authority upon courts of bankruptcy to determine all claims of bankrupts to their exemptions;' and this jurisdiction is exclusive—the state courts cannot pass upon them, although it is true the state laws set bounds and limits of the right to the exemptions—the exclusive forum where these rights are to be determined is the court of bankruptcy." Remington on Bankruptcy, sec. 1026. McGahan *vs.* Anderson, 113 Fed. 115. It is nowhere said in the case-stated that the fund claimed to be answerable to the assignment, and to the attachment execution was ever set apart to the defendant, under authority of the bankrupt court, and, unless that is so, it is in the hands of the trustee, like other assets of the bankrupt estate and answerable to the bankrupt's debts. The existence in the defendant's right of an assignable, or attachable fund is indispensable to the legal efficacy of an assignment, or an attachment of any part of it, and it should be made to appear by unambiguous averment in the case-stated.

"An agreed case must contain all the material facts that are necessary for the determination of the questions of law arising out of the controversy." 1 Ency. Pl. & Pr. 385. If the bankrupt court ever passed on defendant's claim for exemption, and awarded it to him in the form recited in the case-stated, it does not so appear. In the absence of any statement to that effect, the federal cases

above referred to would be persuasive that it had not done so. "A case-stated must disclose facts necessary to an intelligent judgment, whatever is not distinctly and expressly agreed upon therein will be taken not to exist; and it is error to base a judgment on facts not set forth in the case stated." Lloyd *vs.* Fendeck, 231 Pa. 367.

We will not say that neither of the claimants have any right to the $290.00 in the hands of the trustee, but will say that the case stated does not show that they have such right. "The court has power to discharge an agreed case when the facts are insufficiently stated, when there is a defect of parties, when a valid judgment cannot be rendered upon the facts stated, and when material facts have been omitted, or are disputed." 1 Ency. Pl. & Pr. 396.

It seems to us this case-stated is incurably defective, and it is accordingly quashed.

FELIN CO. *vs.* BRIGHT.

Letters Signed in Typewriting—Remarks of Counsel.

Letters signed on the typewriter are admissible in evidence.

Remarks of counsel are not to be considered as reason for new trial when they do not appear clearly upon the record and when they are withdrawn by counsel making them.

Rule for new trial, No. 265, May Term, 1912.

S. M. Enterline, for Rule.
W. C. Devitt, Contra.

Bechtel, P. J., June 30, 1913. This case comes before us on a motion for a new trial, in support of which three reasons are alleged, first, that the Court erred in the admission of testimony, second, that the Court erred in not sustaining a motion for binding instructions for the defendant, and third, the Court erred in overruling the motion to withdraw a juror for improper remarks to counsel for plaintiff. We will consider the reasons together.

The plaintiff in this case is in the lumber business in the city of Philadelphia and has telephone connections between its office and the outside world. On the 25th day

of April, 1911, the company was called up on the telephone and informed that the party calling was Hunter F. Bright, of Ashland; after some inquiries as to the prices and delivery of a car load of lumber, known as number one yellow pine flooring common, a car was ordered to be shipped to Hazleton, the price being fixed at $26.00 per 1000 F. O. B. cars Hazleton. The next day, a letter was sent to Hunter F. Bright, Ashland, giving the number of the car and confirming the telephone conversation. On reply thereto, a letter was received dated at Ashland, written on the letter-heads of Hunter F. Bright, the signature of which was in typewriting.

Counsel for the defendant objected to the introduction of the telephone conversation and the letter for the reason that the voice of the party using the telephone was not positively identified as that of Hunter F. Bright and for the further reason that the letter did not bear his written signature.

A number of letters passed between the parties in this case and the defense interposed to the collection of the claim was that the car-load of lumber had never been ordered by Bright and received by him. That it must have been ordered by Hunter F. Bright Lumber Company of Hazleton, with whom defendant had been connected but which, at the time of the suit, was insolvent and in the hands of a receiver, Charles Morrill.

It is a very significant fact appearing in the correspondence introduced at the trial that many of the letters bear the date of Ashland and are written on the letter heads of the defendant, Hunter F. Bright and are replies to the letters mailed to Hunter F. Bright at Ashland by the plaintiff company. Whereas, letters from Morrill are dated at Hazleton and when signed with the name of Hunter F. Bright are signed per M.

While it is true that the defendant testified that he never received the lumber nor any of the letters in relation thereto, nor did he answer or authorize anyone to answer the same for him, still one cannot escape the conclusion from the correspondence and the testimony of the defendant himself that these statements are not correct. In view of the practical confirmation contained in these letters and the admission relative to the receipt of the

car load of lumber, we feel that the telephone communication was properly received in evidence.

We are also of the opinion that the letters signed on the typewriter was properly received. See Lancaster *vs.* Ames, 17 L. R. A., 229. As to the remarks of counsel, they do not appear very clearly from the record, there being some dispute between counsel as to what was actually said, the Court not having heard the same. We do not think that anything was said by counsel for the plaintiff that could have prejudiced defendant's case, particularly in view of the fact that counsel said that if he had made these remarks he would withdraw them, that there was no evidence to support them and the Court instructed the jury that they were to disregard them for the same reason.

There can be absolutely no doubt in mind of any unprejudiced seeker for the truth in this case that the judgment is just and that the defendant resorted to statements absolutely untrue in an endeavor to prevent its entry. We, therefore, decline to interfere with the same.

And now, June 30th, 1913, the motion for a new trial and for judgment n. o. v. is herewith overruled and judgment is directed to be entered sur verdict.

REESER *vs.* METROPOLITAN ELECTRIC CO.

Evidence—Province of Jury.

If there is evidence by which the existence or non-existence of a fact can be determined, the jury must be deemed competent to draw the proper conclusion. The Court cannot withdraw from them the determination of a question which thus belongs to them, upon the assumption of probable prejudice, sympathy or lack of comprehension.

Negligence—Cause of Injury Proved Circumstantially.

The casual connection between an injury and negligence alleged to have occasioned it may be shown circumstantially, as well as directly, or by a succession of events so linked together as to constitute a natural whole.

Where the proven circumstances point to an inference as the most probable of all possible inferences and the jury's conclusion is based on such inference, the verdict will be sustained.

The conclusion of a jury based on a co-ordination of presumptions, mutually consistent, which arise from facts proven by evidence the jury was at liberty to accept as sufficient, and whose combined effect it was for the jury to ascertain and declare, will not be disturbed on motion for judgment n. o. v.

In the Court of Common Pleas of Berks County. No. 54 November Term, 1910. Verdict for plaintiff: Rule by defendant for judgment n. o. v.

C. H. Ruhl and Richmond L. Jones for Defendant and Rule.

Harvey F. Heinly, Contra.

Opinion by Endlich, P. J., June 21, 1913. At the close of plaintiff's evidence on the first trial of this case a compulsory non-suit was entered. It was subsequently, for reasons given in an opinion reported in 5 Berks Co. L. J. 69, taken off, and the cause was then tried at length, the jury returning a verdict for plaintiff. Its amount is not attacked as excessive. But the plaintiff's right to recover at all is earnestly denied on behalf of the defendant, who obtained this rule under Act 22 Apr. 1905, P. L. 286. It is admitted by defendant's counsel that, at the last trial, the plaintiff's evidence was "substantially the same as at the first." Since upon an application of this kind, the defendant's contradictory testimony is eliminated: Duffy *vs.* W. & P. Co., 233 Pa. 107, 111, it is therefore sufficient to refer to the opinion heretofore filed for a statement of the evidence.

A re-examination of the previous decision has not led to the conclusion that the legal principles on which it proceeded were misconceived or misapplied, or that the conditions of a recovery in this action were inaccurately stated. The right of plaintiff and the liability of defendant seem to hinge upon whether or not the defendant's foreman, holding the butt of the pole with the cant-hooks, and about to give, and with a view to giving an order to the pike-men, improperly leaned to the side and thereby caused the pole to fall. If so, his act was one of negligence committed in the performance of his duty of superintendency and therefore chargeable against the defendant company; if not, it was the act of plaintiff's co-employe, for which defendant is not to be held responsible. It must be conceded that, applying the test of superintendency to the act of the foreman, the basis of plaintiff's recovery is a pretty narrow one. Yet it seems to be a substantial one. At any rate, according to the authorities, the test indicated is made decisive by the

statute. A case may indeed be so plain as to compel the conclusion, as a matter of law, that the act in question was one of superintendency, as in Kelly *vs.* Mfg. Co., 239 Pa. 555,—or was not, as in Hurley *vs.* R. R. Co., 238 id. 65. Where, on the other hand, the conclusion depends upon disputed facts and the probable and reasonable inferences to be drawn from them, it is obviously for the jury: see Trust Co. *vs.* R. R. Co., 160 id. 590, 600,—and so, where the circumstances, though undisputed, admit of divergent interpretations: see Pass. Ry. *vs.* Boudrou, 92 id. 475, 481. In all such cases, whatever trouble there is about the application of the test of superintendency arises from the difficulty of determining a fact whose external indicia may be, not only obscured by contradictory testimony, but capable of impressing different minds differently. It has, however, been observed that "no question of fact is too difficult for a modern jury:" Ry Co. *vs.* Taylor, 104 Pa. 306, 317. That is to say, if there is evidence by which the existence or non-existence of a fact can be determined, the jury must be deemed competent to draw the proper conclusion. The Court cannot, of course, withdraw from them the determination of a question which thus belongs to them, upon the assumption of probable prejudice, sympathy or lack of comprehension. Neither, it must be remembered, in the event of a verdict apparently vitiated by any of these, is the entry of judgment contrary to it the appropriate remedy: see Sloan *vs.* Ry. Co., 231 Pa. 382. But the defendant's contention in this case is that, in several material aspects, it wholly lacks the evidence needful for the determination by the jury of the questions submitted to them. The burden being on the plaintiff to show that something the foreman did caused the pole to fall, that that something was an act of superintendency on his part, and that it was negligence, it is insisted that a connection between the foreman's sidewise motion and the falling of the pole has not been shown but left to conjecture,—that the jury's finding as to the character in which he was acting rests on nothing better than a guess at his undisclosed purpose,—and that the ultimate inference of negligence causing the injury and subjecting the defendant to liability can have been arrived at only by piling presumptions upon presumptions, in disregard of the principle that, to justify an inference, or presumption

of fact, from a fact, the latter must itself not be presumed but fixed and ascertained by proof: Douglass *vs.* Mitchell, 35 Pa. 440, 446; McAleer *vs.* McMurray, 58 id. 126, 135; R. R. Co. *vs.* Henrice, 92 id. 431, 434; Dettra *vs.* Kestner, 147 id. 566, 572; U. S. *vs.* Ross, 92 U. S. 281; Manning *vs.* Ins. Co., 100 id. 693.

Briefly summarized, what is testified is that a pole, wet and slippery from rain, was about to be slid into its hole,—that the defendant's foreman was holding the butt of it with the cant-hooks at the hole,—that the purpose of so holding it was to steady it in sliding in,—that it was essential to the safety of the operation that it should be held steady,—that the high-pike men whose business it was to walk forward at the word of command and raise the pole so as to cause it to sink into the hole were waiting for the word,—that it was the province of the foreman to give it,—that at that moment he leaned to the side "and that quick" the pole turned, slipped off the point of the dead-man held by plaintiff, threw off the supporting pikes, and fell on the plaintiff. Clearly from this evidence, if believed by the jury, it was a matter of legitimate inference that a sidewise movement of the person holding the cant-hooks, communicated through them to the pole, would tend to cause the same to fall, and that therefore such a movement would be an act of negligence. With the tendency and quality of the act thus established, the direct proof of the foreman's movement and of the immediate falling of the pole sufficiently connected the former as the cause with the latter as the effect,—i. e., justified a finding that in moving to the side the foreman communicated his motion to the pole and made it fall,—and hence an adequate foundation for an inference that the plaintiff's injury resulted from a negligent act of the foreman. True, no witness testifies to having seen the pole turning by reason of the sidewise movement of the foreman. But surely that was not indispensable, or in the nature of things, to be expected. It is certain that, in order to hold a defendant for an injury alleged to have been occasioned by his negligence, the casual connection between the two must be shown and cannot be guessed at: R. R. Co. *vs.* Schertle, 97 Pa. 450; Curtin *vs.* Somerset, 140 id. 70; Reese *vs.* Clark, 146 id. 465; Higgins *vs.* Fanning & Co., 195 id. 599; Wagner *vs.*

Traction Co., 212 id. 132; Merrigan *vs.* Evans, 221 id. 4; Runkle *vs.* Pittsburgh, 238 id. 349; Ry. Co. *vs.* Jackson, 3 App. Cas. 196. But it is equally certain that this connection may be shown circumstantially, as well as directly, or as put in Temme, *vs.* Schmidt, 210 Pa. 507, 510, by a "succession of events so linked together as to constitute a natural whole." Had there been nothing to show that an unsteady holding of the cant-hooks had a tendency to cause the pole to fall, the conclusion that it fell from that cause might have been obnoxious to the criticism that it was a mere guess: see Snyder *vs.* R. R. Co., 239 Pa. 127. But a finding based on evidence which, on the theory of reasonable probability, would lead the mind naturally to the conclusion in question, is not a guess: Friend *vs.* Kramer, 236 id. 618, 622. The decision of the Supreme Court in Wagener *vs.* Ry. Co., 235 id. 559, is an affirmance of the proposition that the effect of circumstantial proof as establishing a fact alleged and denied to be necessarily involved in it, is for the jury: and it may be noted as peculiarly pertinent to the point here made by defendant that there the escape through the spark-arrester of ignited particles of soft coal of considerable size and capacity to carry fire was permitted to be inferred from proof of the use of soft mixed with hard coal, of the tendency of such particles to expand in the air, and of the distance a spark would have to travel to reach plaintiff's premises where the fire was set, although no witnesses could have seen the live sparks and there was no evidence that dead ones of inordinate size were found near by.

There remains the question whether the act of the foreman causing the fall of the pole was done by him in the exercise of his functions of superintendency. That this fact can ordinarily appear, if at all, only inferentially is self-evident. It cannot so appear where, of several possible inferences, all are equally probable under the surrounding facts: see Alexander *vs.* Water Co., 201 Pa. 252. It does, however, so appear if the proven circumstances point to it as the most probable of those possible inferences: see Merrett *vs.* Accid. Ass'n, 98 Mich. 338, 57 N. W. 169, approved in Taylor *vs.* Assur. Corp., 208 Pa. 439. If the direct evidence above stated describing the situation immediately before and at the moment of the occurrence and the foreman's duty in determining the instant

for the next and last step is true, the inference therefrom seems very obvious that he was about to give the command to the pike-men to raise the pole, and that his intent in leaning out to one side was to ascertain the readiness of everything for that command and assure himself of the propriety of giving it,—an inference far more reasonably indicated and more probable than that he did a thing he must have known to be dangerous, thoughtlessly or accidentally, or in any way except with a consciousness of his responsibility and purpose in directing the operation. In other words, the commission of the act causing the falling of the pole, as one in the line of the foreman's authority and duty of superintendency, might be inferred from those circumstances. In this connection again the Supreme Court's approval of the decision in Wagener *vs.* Ry. Co., supra, may be referred to as significant. There one of the material questions was whether the fireman on defendant's locomotive had used a greater than the prescribed proportion of soft in mixing it with hard coal. He had the opportunity of doing so, the work his engine was engaged in was such as to make it convenient and desirable to do so in order to get up steam quickly and effectively, and, the other facts proven being consistent with his having made use of his opportunity, an inference that he had done so was held permissible. Here, as bearing upon the question of the capacity in which the foreman was acting at the critical moment, the situation as testified to was one in which he would be expected to exercise his powers of superintendency,—he was in a position to exercise them,—it was his duty to exercise them,—his action was consistent with a design on his part to exercise them,—and hence, by analogy with the ruling in the case cited, it must be considered to have been permissible for the jury to infer that he did what he did in the exercise of those powers and in the performance of those duties.

It would thus appear that, assuming, as we must upon this rule, the verity of the evidence supporting the conclusion of the jury, the latter is not to be treated as the outcome of a building of one presumption upon another, (except perhaps, as pointed out in Lerch *vs.* Bard, 162 Pa. 307, 315, in the sense in which it is true that "all facts not mathematically demonstrable are more or less presumptions," and in which, therefore, the principle in-

voked by defendant is not to be understood), but rather as the result of a co-ordination of presumptions, mutually consistent, which arise from facts proven by evidence the jury was at liberty to accept as sufficient, and whose combined effect, as in all cases of circumstantial proof, it was for the jury to ascertain and declare. If so, there is no warrant for the entry of a judgment contrary to the verdict, and therefore,—

The rule to show cause is discharged.

MAYER *vs.* GEISE.

Bailment—Lease—Sale

A sale and delivery of personal property with an agreement that the ownership shall remain in the vendor until the purchase money is paid enables creditors of the vendee to seize and sell the same for the payment of his debts. Whenever it appears, from the contract between the parties, that the owner of personal property has transferred the possession thereof to another, reserving to himself the naked title thereof, solely for the purpose of securing the payment of the price agreed upon between them, the contract is necessarily a conditional sale and not a bailment and while good between the parties is worthless as to creditors and bona fide purchasers from the transferee without notice.

In the Court of Common Pleas of Schuylkill County. Rule for new trial—No. 308, March Term, 1913.

H. O. Haag, J. B. Reilly and S. M. Enterline, for Rule.
I. A. Reed, Contra.

Bechtel, P. J., June 30, 1913. This case comes before us on a motion in arrest of judgment and to enter judgment for the plaintiff, n. o. v., and a motion for a new trial. Four reasons have been assigned in support of these motions, which we will consider together.

At the trial, after the plaintiff and the defendant had closed their cases the defendant asked the court to direct a verdict in favor of the defendant for the value of the personal property as testified to by Ira S. Mayer, the claimant in this case. The Court directed a verdict in favor of the defendant, but left it to the jury to ascertain the value of property. It is to these binding instructions that the plaintiff objects.

Ira S. Mayer was the owner of a certain butcher shop and the machinery necessary for the carrying on of the business, and a wagon and sled. On the 7th of December, 1911, he entered into an agreement to sell the same to Adam J. Kimmel, describing the property at length in the said agreement and receiving five hundred dollars upon the execution of the same and a note for the balance of five hundred dollars, forming the total consideration in said agreement, the said note being discounted and the proceeds going to Ira S. Mayer. This note had not been paid at the time of the trial. On the 16th of October, 1912, the same parties entered into another agreement in the nature of a lease for the identical articles described in the first agreement, and in addition thereto, three horses. On December 19, 1912, D. T. Geise had judgment entered against J. A. Kimmel in the sum of six hundred and sixty dollars on a single bill dated November 21, 1912, the debt being for cattle furnished by D. T. Geise to J. A. Kimmel, some of which, at least, if not all of said indebtedness being incurred prior to the execution of the said agreement of the 16th of October, 1912. The evidence discloses the fact that J. A. Kimmel took possession of the personal property under the first agreement hereinbefore recited. At the execution of the second agreement the possession of the property remained unchanged, and so far as the property described in the first agreement is concerned, it never left the possession of J. A. Kimmel from the time of the execution of the first agreement and its delivery thereunder until the institution of these proceedings. The three horses mentioned in the second agreement of lease were never the property of the lessor, Ira S. Mayer, and it was sought by the parties to give him possession of the same by taking them to the barn of Mayer and permitting them to sleep there one night and then returning them to the said J. A. Kimmel. The evidence also discloses the fact as testified by Mr. Mayer himself, that some time prior to the execution of the agreement of the lease October 16, 1912, Mr. Geise inquired of him relative to the financial condition of J. A. Kimmel to whom he was furnishing, or about to furnish the cattle which formed the basis of the judgment note under which execution was issued in this case. Mr. Mayer's reply does not clearly appear from his

testimony, but he does state that he did not inform Mr. Geise that he claimed the personal property in the possession of Mr. Kimmel, and that he only gave him this information after the execution issued on the note and the property had been actually levied on by the sheriff. He states that the reason he did not do this was because Mr. Geise did not ask him who owned the property. It also appears from the evidence that Mr. Kimmel had his name painted on the wagon which he used in the delivery of material in his business.

Counsel for the plaintiff claim that the lease was a bailment of this property, and as such the plaintiff can hold it against the execution creditor of the lessee. There have been many cases adjudicated in Pennsylvania upon this subject, and in some instances the line of demarkation between them, to our mind, is not very plain, but it seems to us that to a large extent each case has been decided upon its own peculiar facts. We are of opinion, under the facts in this case and the language of these agreements, that the first agreement of December 7, 1911, was a sale of the property therein described to J. A. Kimmel, and counsel for plaintiff do not seriously contend that it was not. This being so, could the parties, under the circumstances of this case, enter into a second agreement on October 16, 1912, when the rights of third parties had intervened, which should operate as a bailment to protect the plaintiff in this case at the expense of the innocent creditors of the lessee? It will be noted in this connection that the claim of the plaintiff does not include the note in its entirety, that was given as consideration of the agreement of December 7, 1911, for he claims four hundred and fifteen dollars and says that of this amount one hundred and fifty dollars is for cattle which he furnished to J. A. Kimmel. He also testifies that Kimmel was entitled to some credits, but what they were does not appear. Could the plaintiff, in order to secure the payment of a note which he received as part of the consideration of a sale of this property, the proceds of which note he had in his pocket, and which note he had not yet been called upon to pay, execute a lease for these goods to the detriment of the creditors who had given the credit on the strength of these goods and had inquired of the plaintiff relative to the financial condition of Mr. Kimmel and had

been told nothing that would put him on his guard or warn him of the facts that the plaintiff claimed the articles in question? Could the plaintiff lease to Mr. Kimmel three horses which the plaintiff never owned and never had in his possession except for the fact that they slept in his barn one night at the time of the execution of the lease. We feel that the law of Pennsylvania, equity and common justice would prevent the carrying out of a transaction such as this.

It is urged upon us, by counsel for the plaintiff, that these parties could execute this lease, and that it would be a bailment and would be binding, and they have called our attention to a number of cases, beginning with Enlow *vs.* Klein, in 79 Pa., 488, and ending with Byers Machine Co., *vs.* Risher, 41 Superior Ct., 469. The latter case is urged upon us as being conclusive of the case at bar. We do not feel that any of these cases is conclusive of this case. In the case of Byers Machine Co. *vs.* Risher, supra, it is true that on the 4th of April, 1903, an agreement had been supplemented on May 5, 1903, by a lease; it is equally true that the court held that this lease would hold the property in question; but it must be noted in this case that the possession of the property was not delivered until the 12th day of June, and that in the meantime no third party's rights were affected. In the case at bar possession of the property was delivered at the time of the conditional sale, and never for one instant did that possession change, and between the execution of the two agreements the rights of Mr. Geise had attached, in addition to which the plaintiff sought to lease property that he never owned and never had in his possession except as hereinbefore set forth.

We think that this case is ruled by another line of decisions beginning with Stadfeld *vs.* Huntsman, 11 Norris, 53, where the Supreme Court carefully pointed out the distinction between a conditional sale and a bailment, explaining the decisions as they stood up to that time. In the Brunswick & Balke Co. *vs.* Hoover, et al., the agreement was much the same as it is in this case, and the court held the transaction was a conditional sale; the Supreme Court saying: "The attempt to disguise it under the cloak of a bailment was too clumsy to have the merit of being clever." They say further: "Such a contract,

while good between the parties, will not keep creditors at bay. It is worthless as to them. There is no principle of law better settled in Pennsylvania than that a sale and delivery of personal property with an agreement that the ownership shall remain in the vendor until the purchase money is paid enables creditors of the vendee to seize and sell the same for the payment of his debts. It would be a needless labor to cite the numerous cases in which this doctrine has been asserted. It is immaterial what the parties called it. The law pays little heed to the label; it looks beneath and examines the nature and character of the contract between the parties." See also Farquhar *vs.* McAlvey, 142 Pa. 233. In this case, in speaking of Enlow *vs.* Klein, supra, the Supreme Court says:

"This case stands upon its own peculiar facts, and to that extent is authority; but as remarked in Stadfeld *vs.* Huntsman, supra, we will not go one step beyond it."

In Forrest *vs.* Nelson, 108 Pa., 481, it was held:

"Whenever it appears, from the contract between the parties, that the owner of personal property has transferred the possession thereof to another, reserving to himself the naked title thereof, solely for the purpose of securing to himself the payment of the price agreed upon between them the contract is necessarily a conditional sale, and not a bailment, and while good between the parties, is worthless as to creditor and bona fide purchasers from the transferee without notice." See also Joseph Ladley *vs.* U. S. Express Co., 3 Superior Ct., 149; Ott *vs.* Sweatman, 166 Pa., 217.

In the light of these authorities, and under the facts submitted in this case, we do not feel that we committed any error in the instructions given to the jury.

And now, June 30, 1913, the motion for a new trial and for judgment, n. o. v. are herewith overruled, and judgment is directed to be entered sur verdict.

CITY OF SCRANTON *vs.* JACOB R. SCHLAGER, ET AL.

Equity—Injunction—Building on Alley—Municipal Supervision—Easement over Contiguous Lands—Release Thereof by Agreement of Owners.

Where three contiguous lots in a city are severally owned subject to a stipulation in the title deeds that fifteen feet of the rear end of each lot be left open for the purpose of an alley, and the land so reserved forms a cul de sac to which no claim of right is asserted by any other property owner, and it appears that the city's tax assessments on the lots for more than twenty years and also its assessment for paving the adjoining street was for a depth including the alley, the city has no standing to enjoin the owners from building on the alley on the mere showing that for three years it was not included in the county assessment, and that the city had recently done some work therein.

In such case the owners of the three lots are all the parties interested, and they have the right, by agreement with each other, to release the land from the easement created by the reservation, and to use the alley for a building or for any other legitimate purpose.

Rule for a preliminary injunction. In the Court of Common Pleas of Lackawanna County. No. 9 March Term, 1913. In Equity.

D. J. Davis, City Solicitor, for Plaintiff.
Welles & Torrey, for Defendants.

Edwards, P. J., March 26, 1913. While it is very clear to us that the rule in this case could be discharged without any extended discussion, allowing the merits of the controversy to be inquired into on final hearing; nevertheless, as it appears that all the evidence obtainable is before us at this preliminary hearing, and as the defendants are about to erect a building on the alley in question in the case, we shall discuss the merits of the case as if it were before us on final hearing.

1. In September, 1866, Jacob Schlager, now deceased, was the owner of lots 14, 15 and 16, in block No. 31. The lots fronted on Lackawanna avenue, the outer lot being a corner lot and running along Washington avenue. Schlager, on the same date, sold lot 16 to Christian Lange, with the following clause in the agreement:

"And further it is agreed by both parties to this agreement, their heirs and assigns, that fifteen feet of the rear of said lot shall be kept and retained open for the purposes and uses of an alley."

The same lot (16, in block 21) was conveyed in 1909 to Samuel Samter, subject to the same reservation as to the alley.

2. The title to the other two lots (14 and 15) afterwards became vested in Jacob R. Schlager, the title papers containing the following reservation:

"That fifteen feet of the rear end of said lots shall be kept and retained open for the purposes and uses of an alley."

Here we have a case of an alley, fifteen feet wide, reserved from the rear of each lot, for the convenience of each lot owner, and appurtenant to each lot. Such alley was desirable because it gave an entrance from Washington avenue to the rear of each of the three lots. The alley is what is known as a cul de sac, or a blind alley. It leads nowhere. Nobody other than the owners have any claim on said alley. There is no other property owner near by asserting any right to the alley.

3. The owners of the three lots aforesaid, being all the parties interested, have determined to do away with the alley, and to use it for building purposes. In other words, the owners have agreed with each other to release the land from the easement created by the reservation; and this they can do unless some other superior right is in the way. The land is theirs, and they can use the fifteen feet of the rear of the lots for any legitimate purpose.

4. The owners of the three lots arranged for the construction of a building on the space formerly occupied by the alley. Application was made to the Superintendent of Buildings in the City Hall for permits. He issued one permit on January 22, 1913, and one on February 5th. The superintendent visited the place, and gave instructions as to certain details required by the building regulations. The contractor proceeded to build and the building was nearly finished when the rule for an injunction was granted in this case.

5. The City of Scranton is the plaintiff. Whatever may be said as to the delay in applying for the injunction, it is clear that the plaintiff has no standing in this case, even if the injunction had been applied for in time. There is evidence to show that for two or three years the alley was left out of the county assessment; but it is agreed that for a period of twenty years or more the lots have been assessed at 133 or 135 feet in depth, which includes the width of the alley. It is also agreed that the corner lot paid the paving assessment on Washington avenue to the depth of 133 feet, which includes the alley. One of the employes of the city testified that he had done some

work in the alley in recent years; but taking the whole evidence on this phase of the case it is consistent only with the private ownership of the alley.

The principle applicable to this case is stated as a general proposition in Ferdinando *vs.* City of Scranton, 190 Pa. 321: "A grantor reserved in his deed for two lots an alleyway ten feet wide, at the request and for the convenience of the grantees. The successive owners of the two lots continued in full, actual possession and constant daily use of the alley. The use of the alley by others than the owners of the land was only permissive, occasional and varying. Held, that the authorities of the city in which the land was situated had no right to prevent the owners of the lots from building over the alley."

The same principle is laid down in Griffin's Appeal, 109 Pa., 150: "Where there is no dedication of land to public use by the owner, use of the same by the public jointly with the owner, and by his sufferance, does not establish a right in the public by dedication, no matter how long such joint use is continued. Dedication is a matter of intention, and when clearly proved is as complete in one day as in twenty-one years. In the absence of opposing proof, a long continued use by the public is evidence of an intention to dedicate, but it is not conclusive and always yields to satisfactory contrary proof. Where the owner of land bordering on a public highway sets his fence back from the highway, for his own convenience, and uses the intervening space, until death, for private purposes, a bill for an injunction will not lie, by the municipal authorities, to restrain the subsequent owner of such property, fifteen years after the death of the former owner, from setting back the fence and again including the said intervening space within the same."

Numerous other authorities could be cited to the same effect.

Now, March 26, 1913, the rule for a preliminary injunction is discharged and the injunction is refused.

CARRIE MEREDITH, ET AL. *vs.* JENNIE BOWIE, ET AL.

Real Estate—Building—Operations—Use of Adjoinig Land.

Where one who is erecting a house on his city lot has the privilege, for a given time, of living upon the adjoining land and removing the house therefrom, such privilege implies only a reasonable use of the land, which does not include the right to deposit building materials and refuse upon it.

But a roadway leading across the adjoining land to a coal shed, which has always been used to carry material to and fro, may be used by him to convey material for the construction of the building on his own land.

Rule to continue preliminary injunction. In the Court of Common Pleas of Lackawanna County. No. 6, May Term, 1913. In Equity.

J. J. Owens, for Plaintiff.
J. P. Kelly, for Defendant.

Edwards, P. J., April 24, 1913. The dispute between the parties in this case is a very simple one and should have been settled without an appeal to court.

The hearing on the rule was quite informal. It consisted of a statement of facts by counsel for both parties, who agreed that the court should consider their statements evidence, subject to correction by sworn testimony at another hearing if the controversy could not be otherwise determined.

In addition to the statements of counsel, we have an agreement entered into in a compromise and settlement of an ejectment suit between J. Wesley Hull, et al., executors, etc., of Harriet Amanda Spencer, deceased, plaintiffs, and Jennie Bowie, defendant. The agreement is submitted to us for interpretation. The said ejectment suit was tried before Judge Searle. After the plaintiffs had closed their case, and on a suggestion by the trial judge, the case was settled by the parties and the agreement of settlement was made a part of the record. This agreement throws a light on the contentions brought forward in the present equity suit.

The ejectment suit brought by the executors covered a lot of land 150 feet square, located on North Main avenue, and bounded on one side by Putnam street; in other words a corner lot. About in the center of this lot

there was a small house, in which the late Amanda Spencer lived and with whom Jennie Bowie, apparently a faithful companion, lived for many years. After the death of Mrs. Spencer, and of her husband later, Jennie Bowie continued to live in the small house. It does not appear that she had any title to the property, although she was a beneficiary under Mrs. Spencer's will. The executors, therefore, in the administration of their trust, brought the said ejectment suit to recover possession of the property. And it was at the trial of this suit that the compromise referred to was made.

The part of the compromise agreement relevant in the consideration of the present dispute is to be found in the second paragraph, and it read as follows:

"That the plaintiffs will execute and deliver a proper deed to Jennie Bowie, the defendant, for a piece of land out of the lands in question forty feet in front on North Main avenue, and one hundred and fifty feet in depth, running at right angles to North Main avenue and adjoining the property of Miss Belle Von Storch; with the understanding and agreement that the defendant shall have the privilege of living upon the property in question from now until she shall have an opportunity to move the present house upon the said lot above mentioned of forty feet by one hundred and fifty feet, not longer than until the first of June, 1913, free of any charge or rent."

In pursuance of this agreement Miss Bowie, who is one of the defendants in the equity suit, became the owner of 40x150 feet of the land which was the subject matter of the ejectment; and it appears also that the plaintiff in the equity suit, Carrie Meredith, became the owner in January last of the remainder of said land, viz., 110x150 feet. Thus these parties, respectively, own adjoining lands. Miss Bowie is improving her land by erecting thereon a frame building, the contractor being Patrick F. Gibbons, the other defendant in the present case.

The plaintiffs in their bill claim that the defendants, (particularly the contractor,) are continuously trespassing upon plaintiffs' land by driving heavy loads of material over and depositing building material and refuse, stones and trees upon said land, to the great

damage of the plaintiffs. Miss Bowie denies the trespass and claims the right to make reasonable use of the land because, according to the compromise agreement, she has exclusive possession of all the land until June 1, 1913.

The agreement provides that Jennie Bowie shall have the privilege of living upon the property, free of rent, until June 1st, so as to give her time to move the present house to her own lot. The extent of this privilege must be measured by the circumstances under which the compromise agreement was effected. Miss Bowie has the right to live in the old house and to make reasonable use of all the land until June 1st. In considering the question of reasonable use another fact must be referred to viz., the roadway leading from the Putnam street side, across the land in question, to a coal shed, and which had always been used to carry material to and fro.

We have reached the following conclusions:

1. The defendant, Jennie Bowie, has the right to use the said roadway to convey materials for the construction of the building on her own lot.

2. The contractor, Gibbons, has no right to deposit material and refuse on any part of the land owned by the plaintiffs.

We are aware that the informal manner in which this case was heard prevents a more definite disposition of the controversy between the parties. If the contractor persists in depositing building material and refuse on plaintiffs' land we shall reopen the case for further testimony. For the present the rule to continue the preliminary injunction is discharged and the injunction is dissolved.

MOGEL *vs.* REESER.

Evidence—Spontaneous Utterances—Res Gestae.

1. The declarations of an injured person as to how the accident in which he was injured occurred are admissible as part of the res gestae where they are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thought created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design.

2. The time that intervenes between the accident and the utterances does not necessarily determine the admissibility of such evidence.

3. The declarations need not be strictly contemporaneous with the litigated act; they may be subsequent to it, provided there has not been time for the actor to contrive and misrepresent.

Practice, C. P.—Evidence—Motion to Strike Out Testimony —Rebuttal.

4. After testimony has been admitted without objection, the proper course is to request the court to instruct the jury to disregard the testimony.

5. The rule as to rebutting evidence is liberally expounded in subserving justice.

Negligence—Automobiles—Witnesses' Opinion as to Speed—Duty of Driver to Stop Car and Engine—Signal to Stop.

6. A non-expert witness is competent to express an opinion as to the rate of speed of an automobile.

7. If the driver of an automobile in the exercise of ordinary caution sees from the conduct of the horse attached to an approaching vehicle, that it is his duty to stop, he must do so whether signalled by the approaching driver or not.

In the Court of Common Pleas of Berks County. No. 37, November Term, 1912. Verdict for Plaintiff. Rules by defendant for new trial and for judgment, n. o. v.

Adam B. Rieser for Defendant and Rules.
Harvey F. Heinly and William Rick Contra.

Opinion by Wagner, J., July 7, 1913. This is a suit for damages brought by the plaintiff on behalf of herself and of her two children, aged respectively ten years and seven years, against the defendant, by reason of the death of her husband, which she claims was brought about by the negligence of the defendant. The negligence charged in the statement is the reckless speed at which the said defendant ran his car, and his failure to stop the automobile and the engine when signalled to do so by the decedent. By reason of this the plaintiff alleges that the team that the decedent, John F. Mogel, was driving, ran away, ran over his body and produced the injuries which caused his death a few hours thereafter.

The defendant has entered motions for a new trial and for judgment n. o. v. The fifth reason for a new trial relates to the admission of evidence to which defendant objected and to the court's refusal to strike out certain testimony from the record. The testimony thus objected

to is, first: The plaintiff offered two witnesses, Adam Reber and Alfred Althouse, for the purpose of showing that immediately after the accident, while the decedent was being helped to his feet and was being placed on the bank at the side of the road, that he, the decedent, had stated to these witnesses, that he had signalled to the automobile to stop, but that those who ran it did not do so. Adam Reber, (N. of T., page 38), testified that after he saw the wagon give a jerk that they then went to the aid of the decedent; that they found him sitting on his hands and knees and that they then helped him up. The question was then put, "What did he say?" to which objection was made by counsel for defendant, which objection was sustained. Later on this witness was recalled. Counsel for plaintiff made an offer to prove what was said by the decedent at this time in explanation of the accident, whereupon we admitted the testimony and gave the defendant an exception. When asked, "what, if anything, did Mr. Mogel state to you and Mr. Althouse, with reference to the accident * * * the time that you helped him from the road to the bank?" he replied, "He told us that he hollered, that he waived his hand, put his hand up, and he wouldn't stop, the automobile wouldn't stop. He couldn't talk that in one stretch; he said a couple of words and then he had to work for his breath." (N. of T., page 56). Then again, on page 57, in answer to the question, "It took you two minutes to get there, and then that would be seven minutes?" he answered, "No, sir, he told us right away." Counsel for defendant contends that the testimony thus given was not part of the res gestae and therefore not admissible.

An examination of the testimony clearly shows that it was almost immediately after these witnesses came to the aid of the decedent that he stated what was testified to by them. Counsel for defendant contends that because at one time the witness testified that it was five minutes after the accident that decedent gave this explanation of the cause of the accident, that too long a period of time had intervened, and therefore the evidence was not admissible. The time that intervened between the accident and when these words were spoken does not necessarily determine the admissibility or inadmissibility of this evidence. In the case of Commonwealth *vs.* Werntz, 161

Pa. St. 591, the Supreme Court, on page 596, say: "No fixed measure of time or distance from the main occurrence can be established as a rule to determine what shall be part of the res gestae. Each case must necessarily depend on its own circumstances to determine whether the facts offered are really part of the same continuous transaction. In the notable case of Hunter *vs.* State, 40 N. J. Law, 495, 538, Beasley, C. J., adopts the definition of Wharton, Evidence, sec. 259, that 'the res gestae are the circumstances which are the undesigned incidents of the litigated act, which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable * * * Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for, or emanations of such act, and are not produced by the calculated policy of the actors.' And with regard to declarations, the rule is well stated in 21 Am. & Eng. Ency. of Law, 102, that if they 'are made under such circumstances as will raise the reasonable presumption that they are the spontaneous utterances of thought created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation and design, they will be admissible as part of the res gestae.'" See also Coll *vs.* Easton Transit Co., 180 Pa. St. 618, 626; Keefer *vs.* Life Ins. Co., 201 Pa. St. 448, 455; Trexler *vs.* B. & O. R. R. Co., 28 Pa. Sup. Ct. 198, 206; Elkins, Bly & Co. *vs.* McKean, 79 Pa. St. 493, 501.

Under these cases we consider that the declaration of decedent was clearly admissible as evidence to show how the accident had occurred. In charging the jury upon this question we were careful to state that the testimony of these witnesses was of value only as the jury found that what these witnesses alleged Mr. Mogel said was really what he did say and also that what Mr. Mogel stated to these witnesses was what really had happened. We consider that this testimony was clearly relevant for the purpose for which it was admitted.

Second: Counsel for defendant complains of the admission of the testimony of Lewis Reber, John Reber, Mrs. Sallie Becker and Jerome Loose. The plaintiff

called them to identify the automobile. By a chain of witnesses of which these four were a part, it was shown that this defendant left Centreport at about half past two o'clock, P. M., and had proceeded on the road to Bagenstose's Hotel. Levi Haag had testified that he saw this defendant pass the Reber Wagon Works; that the auto was a small runabout, and that Reeser was running it. Lewis Reber and John Reber, who were at the same place, were called for the purpose of corroborating in part the witness Haag. They testified that they saw an automobile similar to the one described by Haag, containing two men, pass by the place where Haag was, and that it went in the direction of Wertz's Bridge, where the accident occurred. Counsel for defendant objects because he claims that Lewis Reber and John Reber were allowed to testify that the automobile was running at a reckless rate of speed. In this counsel is mistaken. After Lewis Reber, without objection on the part of defendant, had testified that the automobile had been running in a reckless way, then counsel for defendant, (N. of T., page 44), asked that the testimony be stricken out. The court told the jury that such testimony was valueless and amounted to nothing; that it was not conclusions that were wanted, but facts upon which the jury could base its conclusions. This instruction evidently satisfied counsel for the reason that no further request or objection was made to this particular matter. When John Reber, (N. of T., page 50), testified that the car was run in a reckless way, counsel for defendant again did not object. After the next question was asked, "What do you mean by that?" and answered, "According to the roads," counsel for defendant then objected. The objection was sustained, and upon his motion the court directed that it be stricken out. The other objections on part of defendant to the admission of the testimony of these two witnesses were sustained by the court and only that admitted to which there was no objection. The entire testimony of Mrs. Sallie Becker was admitted without any objection on the part of defendant. At the close of the testimony of John Reber and Mrs. Sallie Becker, and after the noon recess of the court, the testimony of Lewis Reber was asked to be stricken out. This was refused. The proper way to raise an exception thereto would have been by asking the court to instruct

the jury to disregard this testimony: McDyer *vs.* East Penna. Rys. Co., 227 Pa. St. 641, 646. The record clearly shows that the entire testimony of these three witnesses was merely to identify the car. For this reason Mrs. Sallie Becker was allowed to testify that she saw the car a quarter of a mile after passing the scene of the accident, although she could not state who was in it. Her testimony was followed by that of Jerome Loose, who stated that about a mile and a half beyond the place where the accident occurred, this defendant passed him, and that he recognized the defendant. The further objection to the testimony of Jerome Loose was that he was permitted to be called in rebuttal. This must be considered in the light of what is said in Kunzman *vs.* Pittsburg Rys. Co., 230 Pa. St. 364, page 365: "This testimony was strictly rebuttal, and, even if not, it is to be remembered that the rule as to rebutting evidence is liberally expounded in subserving justice: Graham *vs.* Lane, 3 Brewst. 92." Defendant testified that Centreport, the place from which he had come, to Bagenstose's Tavern, was distant five miles, and that to travel these five miles it had taken him half an hour. The testimony of Harry Bender was practically the same, except that in direct examination he stated that the rate of speed at which they had run prior to the time that they came to the bridge was 15 miles an hour, and when cross-examined he was asked at what rate they had gone after leaving the bridge, he answered, "Well, I can't say; I judge about the same gait." This was for the purpose of rebutting the allegation on the part of the plaintiff that defendant was running at a reckless rate of speed. Jerome Loose's testimony was that when the defendant passed him he was going at the rate of 25 miles an hour, which was clearly relevant as bearing upon the credibility of both these witnesses when they either directly or inferentially testified that they were going at a rate of only 10 or 15 miles an hour.

The first, second, third and sixth reasons for a new trial raise the question whether the evidence was sufficient to submit the case to the jury. The testimony of the two witnesses as to what the decedent had said was the cause of the accident, the testimony of Mrs. Edna Reber, who said that defendant was running at the rate of 35 miles an hour, and this testimony, under Dugan *vs.*

Arthurs, 230 Pa. St. 299, was clearly competent, her testimony and that of her husband, when they said that the automobile did not stop at the bridge, clearly required us to submit this case to the jury. There may have been some question prior to defendant's evidence as to the identity of the automobile that caused the accident, but defendant's testimony left that no longer a matter of doubt.

Defendant complains of certain portions of the charge. That on page 1, of the charge, the court made a mis-statement when it said, "You will remember the testimony of Mrs. Reber, where she sat, that she saw the horses start to run, and what Mr. Mogel was doing at the time." An examination of her testimony, (page 20, N. of T.) shows that the testimony was practically such as the court stated it to be. An examination of Adam Reber's testimony, (page 39, N. of T.), also bears out the charge. He says he heard a noise, a rattling noise; that he then next saw the team on the other side of the house towards Centreport. The defendant complains to that portion where the court, on pages 2 and 3, said, "But it does not make any difference whether it was the car which caused the accident or whether the identity of this machine is established." This part of a sentence must be taken in connection with the other part, and also the following sentence, to show that the jury could not have been misdirected: Knights of Pythias *vs.* Leadbeter et al., 2 Pa. Sup. Ct. 461, 474; Lesher *vs.* Youse, 52 Pa. Sup. Ct. 383. The court said, "It is only as you find that this defendant was guilty of negligence in running the machine and that that negligence was the cause of the death of Mr. Mogel, that you would be warranted in bringing in a verdict for the plaintiff. It is only as you find negligence in this defendant that that negligence brought about the scaring of horses, causing them to run away, and that this resulted in the death of Mr. Mogel, that the plaintiff would be entitled to damages."

The further complaint is that when the court, on page 9, charged with reference to contributory negligence, it said that "Defendant says that decedent was standing on the wagon." We submitted to the jury the question of whether the decedent was standing on the wagon, as bearing upon the question whether this was a

negligent way of driving. An examination of the testimony shows that the defendant and his witness, Bender, both say that at the time the decedent was passing the automobile that he was on the ground and aside of the saddle horse. Plaintiff's witness, Mrs. Reber, was the only one who said that she saw decedent on the wagon. This she stated was when he was about to go upon the bridge with his horses, at the far end thereof. It is a question whether from this evidence, this matter as a question of contributory negligence, should have been at all submitted to the jury. We fail to see how defendant suffered thereby.

Another complaint to the charge is that the court failed to specifically state the testimony of the defendant as it did that of the plaintiff. In this we do not consider there was error. The plaintiff called fourteen witnesses, the defendant five, which would necessarily result, in a partial review of the testimony of these witnesses, in devoting more time to the testimony of the plaintiff's fourteen than defendant's five witnesses.

The defendant submitted seven points which were all refused and not read to the jury. In the first point the court was requested to direct a verdict for the defendant "If the jury believes the testimony of Harry Bender and the defendant that he, the defendant, stopped his automobile on the approach to the bridge at the side of the road until the team of the decedent had cleared the bridge and the auto and then started his machine and proceeded on his way." This we do not consider in itself sufficient to have justified the court to direct the jury to return a verdict for the defendant. The question at issue was not merely the stopping of the automobile, but also the rate of speed at which it was going, the place where it stopped, whether or not the situation, by reason of the conduct of the horses, may not have been such that it required not merely the stopping of the automobile, but also the stopping of the engine. Even if he had stopped his automobile after the running of the automobile so close to the horses as to frighten them and thus render the horses unmanageable after they had passed the automobile, for the accident that would happen immediately subsequent thereto the defendant might nevertheless be liable.

The second point, together with the fifth, sixth and seventh, were all requests for binding instructions. We have already stated that we consider that this was a case to be passed upon by a jury. The plaintiff testified that $10 a week of the decedent's earnings went to the support of herself and her two children.

The third point as it stood could not be affirmed. Even if the jury should believe the defendant and his witness, that Mogel's team was under perfect control just at the time when passing an automobile, we conceive that if the jury found from the evidence that Mogel had signalled the defendant to stop his engine it was his duty to do so. Mogel was best able to judge of the disposition of his horses, and whether the passing of an automobile and the noise made by it, would not be such as to excite the horses to such an extent that, whilst momentarily under control in passing the automobile, yet by reason of the action of the automobile in thus passing, he might almost immediately thereafter lose control of them.

The fourth point conceives that it is the duty of the driver of an automobile to stop and wait only when signalled to do so. This is not the law. The Act of Assembly may require this to be done and provide penalties for failure to do so, but plain common sense requires more. If the driver of an automobile in the exercise of the use of ordinary caution, by reason of the conduct of the horse attached to an approaching vehicle, sees that it is his duty to stop, he must do so whether signalled by the approaching driver or not. If he does not he may become liable by reason of his failure to exercise the care of an ordinarily cautious person.

Rules for new trial and judgment n. o. v. are discharged.

COMMONWEALTH *vs.* KEHOE.

Larceny as Bailee—Retention of Proceeds of Note.

Prosecutor delivered to defendant a promissory note for $250, which was taken by the latter to the maker, who gave defendant a certificate of deposit for $200 and a check for $50, both of which were deposited by him to the credit of a third party. On a conviction of larceny as bailee, Held, that the conviction cannot be sustained.

Even if the note was given to the defendant for the purpose of collection and turning over the money to the owner, still there was no such bailment as would sustain a conviction for larceny as bailee under Sec. 8 of the Criminal Code.

To sustain a conviction, it must appear that the defendant was to return the identical property, after the purpose of the bailment was accomplished.

If the story by which the defendant procured the note was a mere trick or artifice to cheat and defraud the prosecutor, it might amount to larceny.

In the Court of Quarter Sessions of York County. Motion for a new trial.

J. R. Strawbridge for Motion.

District Attorney R. P. Sherwood and J. St. Clair McCall, Contra.

August 18, 1913, Wanner, P. J. The defendant, John W. Kehoe, was convicted generally on a bill charging him with larceny as bailee of one promissory note for $250.00, one certificate of deposit for $200.00, one check for $50.00, and $250.00 in money, being the property of the prosecutor, Joseph W. Sitler.

This motion in arrest of judgment and for a new trial, is based on the single contention that there was no such bailment of any of said property as would sustain a verdict of guilty in this case.

The $250.00 note in question had been given by Thomas J. Young, the maker, to The Central Agency Company for certain stock, and by endorsements of said Company and of John W. Kehoe, its president, had become the property of the prosecutor.

The only evidence of any bailment of this note was the following meager and indefinite testimony of the prosecutor himself.

"Q. You got this note, you say on the date of the check? That is, May 25?. A. Yes.

Q. Now you kept this note until what time? A. Well, I don't know exactly any length of time.

Q. Was it or not shortly before the 14th day of June? A. Yes, somewhere in that neighborhood.

Q. Then to whom did you hand it? A. Then I gave it to Mr. J. W. Kehoe.

Q. For what purpose? A. For the purpose of going up to meet Mr. Thomas J. Young. He told me he was going up to see, that day, Mr. Thomas J. Young, and he was going to meet the cashier of the Dover National Bank; and if I would give the note back, that would save a trip to see Mr. Young, and he would give the money back to me.

Q. Who told you that? A. John W. Kehoe.

Q. Where was Mr. Young at that time? A. He was at home close to Dover at that time.

Q. After he told you that, did you or not turn the note over to him for that purpose? A. I turned the note over to him for that purpose; and he sent me over to see Mr. Minnick at Dallastown, about the insurance."

This leaves it somewhat uncertain what the precise agreement and intent of the parties really was, when the note was given to the defendant by Joseph W. Sitler. The defendant testified that he was to apply the proceeds of the note to the uses of the Company which was then in need of money, and that it was afterward to be repaid to the prosecutor. But assuming that the defendant was to collect the note and turn over the money to the prosecutor as contended by the Commonwealth, we are of the opinion that there was no such bailment of this note, as would sustain a conviction of the defendant for larceny as bailee thereof under Sec. 108 of the Act of March 31st, 1860, P. L. 308.

The defendant delivered the note to the maker and received in payment thereof, the maker's certificate of deposit for $200.00, and his check for $50.00, both of which defendant deposited in bank to the credit of the Central Agency Company, instead of turning them over to the prosecutor. The certificate was so endorsed as to become payable to bearer, and the chcek was made payable to said Company directly at the request of the defendant.

There are material differences in the definitions of a bailment given by different commentators and text writers, and also in the conclusions reached thereon by Courts

of different jurisdictions. But the Supreme Court of Pennsylvania has repeatedly held that to sustain a conviction of larceny by a bailee, under our Act of March 31st, 1860, it must appear that the identical property delivered to the defendant was to be by him returned to the bailor, after the purpose of the bailment had been accomplished; Comth. *vs.* Chathams, 50 Pa. 181; Comth. *vs.* Cart, 2 Pitts. 495; Krause *vs.* Comth., 93 Pa. 418.

These decisions have been uniformly followed by the lower courts in numerous cases, vide; Comth. *vs.* Barrett, 28 Pa. Super. Ct. 112; Comth. *vs.* Warren, 2 Blair Co. R. 77; Comth. *vs.* McGregory, 2 Blair Co. R. 201; Comth. *vs.* Longnecker, 1 Lanc. Bar (No. 2); Comth. *vs.* Frantz, 8 Phila. 612; Comth. *vs.* Kahler, 29 Lanc. L. Rev. 75; Comth. *vs.* Rydsevicz, 39 Pa. Co. Ct. R. 523.

In this case it is clear that the parties did not contemplate the return of the note itself in case it was paid, but the proceeds of its collection. There was therefore, no larceny of the note by the bailee, nor could there be any conviction of defendant for larceny as bailee of the check and certificate of deposit received in payment of the same, as they had never come to the hands of the prosecutor, or been delivered by him to the defendant for any purpose; Comth *vs.* Cart, 2 Pitts. Rep. 495; Comth. *vs.* Barrett, 28 Pa. Super. Ct. Rep. 115; Comth. *vs.* Eichelberger, 119 Pa. 254; Comth. *vs.* Yerkes, 119 Pa. 266.

The last count in this bill charging the larceny of $250.00 in money was not supported by evidence of the taking of any sum of money as such, and seems to have been intended to cover the total value of the certificate of deposit and the check received in payment of the $250.00 note.

It was contended by the Commonwealth that there was an implied contract that the note should be returned to the prosecutor if not paid in money by the maker, and that its delivery to the maker on payment otherwise was a fraudulent conversion of the note itself, which would sustain a conviction. But no Pennsylvania authority for such conclusion has been cited or found and those from other jurisdictions looking that way will be found to be based on definitions of a bailment differing from that adopted by our courts of last resort. It may be that in a simple bailment for use, or for hire, where there was no

express stipulation when the article was to be returned, the law would imply a contract to return it after the purpose of the bailment had been carried out. But the circumstances of this case are so entirely different as not to fall within the application of that rule.

The fraudulent conversion of the proceeds of the collection of this note by the defendant, may have been a criminal offense punishable under another section of the Act of March 31st, 1860, as suggested in Commonwealth *vs.* Cart, or if the story by which defendant procured the note was a mere trick or artifice to cheat and defraud the prosecutor, it might amount to larceny, as held in Commonwealth *vs.* Eichelberger, but it did not in our opinion constitute larceny by the defendant as bailee of the prosecutor's property.

The motion for a new trial is granted.

STEIGER *vs.* STEIGER.

Divorce—Desertion—Cruel Treatment—Acts of May 8. 1854, P. L. 644 and June 25, 1895, P. L. 308.

A separation of a husband and wife by consent or agrement is not desertion.

A few isolated acts of violence committed a considerable time before the separation of a husband and wife for more than two years, are not ground for divorce.

Where a husband and wife lived together after separating a couple of weeks this is evidence of a condonation of alleged prior cruel treatment, though not conclusive.

The law requires a libellant to prove his case by a preponderance of evidence, and where his charges rest upon his unsupported testimony and this is denied by the respondent in whole and his son and daughter in part he can not be said to have proved his case.

In the Court of Common Pleas of Lancaster County. December Term, 1911, No. 8. Divorce. Exceptions to report of master.

B. F. Davis, for Libellant and Exceptions.
Willis G. Kendig, for Respondent.

July 5, 1913. Opinion by Landis, P. J.

The libel in this case is apparently based upon three reasons, but the cause alleged in the last two sections is the same. The first ground is desertion, and the second,

cruel and barbarous treatment. There is no charge of indignities to the person contained therein, although it would seem that a large part of the testimony was directed to that ground. The master, appointed by this Court, having taken considerable evidence, recommended that no divorce be decreed, and the libellant now complains that, in so doing, he did not give proper effect to the testimony. By a careful examination of it, we hope to determine that question.

It has been found by the master (and there is no dispute between the parties concerning it), that the libellant and respondent have not lived together as man and wife since about January 10, 1911. The Libellant asserts that they parted about September 1, 1910; but it is not very important which date is the correct one, if there was an actual separation between them. On this point, however, the master finds that the separation was by consent, and if this be true, no divorce can be granted by us for this cause.

In Middleton *vs.* Middleton, 187 Pa., 612, Mr. Justice Dean, in giving a short resume of the law upon this subject, said: "As we have held over and over again, a separation is not, on the part of either, wilfull and malicious desertion. In Ingersoll *vs.* Ingersoll, 49 Pa., 249, it is decided: 'Separation is not desertion. Desertion is an actual abandonment of matrimonial cohabitation, with an intent to desert, wilfully and maliciously persisted in, without cause, for two years. The guilty intent is manifested when, without cause or consent either party withdraws from the residence of the other.' And in Graham *vs.* Graham, 153 Pa., 450, it was held that, where the evidence showed that the wife gave her husband to understand that she did not want his society, and in consequence he lived apart from her five or six squares distant, this did not constitute wilfull and malicious desertion on his part. And the same principle is applied in many other cases." In Cooper *vs.* Cooper, 37 Sup., 246, it was held that "a divorce will not be granted to a husband for desertion by his wife, where there is no evidence as to whether his wife went voluntarily, was expelled by her husband, or left in pursuance of a mutual agreement, while there is evidence that the husband, within a few days after the departure of his wife, leased his house to a

tenant, left the state, and never made any attempt to communicate with his wife, or to give her any intimation as to where he had located. In such a case, the law will presume that the parties separated by mutual consent." In Middleton *vs.* Middleton, supra, it was also held that, "where a husband has suggested and encouraged a separation between himself and his wife, he cannot charge her with wilfull and malicious desertion."

Now, in this case, the libellant testifies that the respondent left him and went to Philadelphia, without cause; but he does not deny that, after September 1, 1910, he ceased to rent and occupy the premises in which they had before lived, and he seems to have paid the storage on her goods at Altick's warehouse, and in conjunction with their son, subsequently shipped these goods to the respondent in Philadelphia. On the other hand, the respondent, her son and her daughter all testify that she did not desert him; that there was an arrangement between them that she should go to Philadelphia, where she could make a living, and that he would contribute five dollars a week towards her support. The weight of the evidence supports this conclusion, and the master was well warranted in sustaining it. We cannot see that he has made any mistake in his recommendation in this regard.

Does, then, the evidence support the charge of cruel and barbarous treatment? In Barnsdall *vs.* Barnsdall, 171 Pa., 625, it was held that, "under the Act of May 8, 1854, P. L., 644, a divorce may be granted to a husband where his wife has, by cruel and barbarous treatment of him, rendered his condition intolerable or life burdensome, although such treatment may not have endangered his life." That Act reads: "III. Where the wife shall have, by cruel and barbarous treatment, rendered the condition of her husband intolerable or life burdensome," whereas the Act of June 25, 1895, P. L. 308, reads: "3. Where a wife shall have, by cruel and barbarous treatment, or indignities to his person, rendered the condition of her husband intolerable or life burdensome." The difference in phraseology, however, does not change the law as it was formerly laid down upon this subject. In Russell *vs.* Russell, 37 Sup., 348, it was held that "any unjustifiable conduct on the part of either the husband or the wife, which so grievously wounds the mental feelings

of the other, or so utterly destroys the peace of mind of the other, as seriously to impair the bodily health or endanger the life of the other, or which utterly destroys the legitimate ends and objects of matrimony, constitutes cruelty, although no physical or personal violence may be inflicted, or even threatened or reasonably apprehended;" but "to warrant the granting of a divorce on the ground of the conduct on the part of either the husband or wife as to render the condition of the other party intolerable and life burdensome, where there is no proof of overt bodily harm actually inflicted or threatened, the evidence should be strong and convincing, the course of ill-treatment complained of must have been long continued, and of a serious character." In Schulze *vs.* Schulze, 33 Sup., 325; Rice, P. J., in delivering the opinion of the Court, said: "It is clear, both upon principle and authority, that whatever directly tends to show a course of treatment which rendered the condition of libellant intolerable and his life burdensome, is admissible in evidence, and that, in determining whether there was cruel and barbarous treatment within the meaning of the statute, the whole conduct of the wife toward her husband during the period of the alleged ill-treatment should be considered. * * * It is true that the charge may be made out without proof of actual violence inflicted upon his person, either endangering life or of a less serious character. But it is equally well settled that, while proof of these acts is admissible in support of the charge, bad temper alone is not ground for divorce, nor is mere drunkenness, or indolence, or thriftlessness, or wilfull neglect of household duties. The acts or conduct of the wife towards her husband, that will entitle the latter to a divorce under the clause of the statute now being considered, must be not only such as render his condition intolerable or life burdensome, but such as amount to cruel and barbarous treatment. Both of these statutory elements must concur. If by other means, which do not constitute legal cruelty, his condition is rendered intolerable, this clause of the statute does not apply." See, also, Fay *vs.* Fay, 27 Sup., 328.

The testimony of the libellant, which is in its material parts not corroborated and which is denied by the respondent, is to the effect that, at one time the

respondent picked up a tea-pot to scald him, and he told her that, if she did, he "would put her out of business." It is not asserted that she did anything to him at this time. It was also claimed that she and a young man by the name of Walter Young came to the house, and also a lot of women, who, he said, were not of good character, and that they quarreled over the women being there. He says that she called him a son-of-a-bitch often, and said that she was the man of the house; that the same evening, she got a butcher knife and said she would cut his guts out, and her two boys interfered. He also testified that, in 1898, she threw a lamp at him and hit him on the side of the face and cut him; and in 1907, two men were in Philadelphia with her and a woman by the name of Ida Baer; that in 1894, she picked up a stove-lifter and threw it at him. All of these alleged acts were committed a very considerable time before the separation took place, and it is clear that none of them had anything to do with the separation. The respondent denies ever having used any violence towards the libellant. She explains the incident of being cut by the lamp as an accident which happened by reason of the chimney falling upon him. They seem to have been isolated acts, and such as have been held as not of themselves a cause for divorce. In Hexamer *vs.* Hexamer, 42 Sup., 226, it was said by the Superior Court: "Even had the libellant separated from his wife in 1902, immediately following the last act of physical violence, the evidence produced as to five widely separated and trivial violent acts during a period of eleven years would not have warranted a Court in granting a decree of divorce, under the provisions of the Act of 1895."

A letter was also produced, addressed to him, containing language which certainly ought not to be used by any woman to her husband; but can it, of itself, be considered as cruel and barbarous treatment? It must be remembered that these parties have been separated for more than two years, and it would seem that the proof should be clear and preponderating, under such circumstances, to warrant a divorce upon this ground. No reasonable doubt arises but that she wrote the letter above referred to. It has no date, but it is directed from 820 North Broad Street, and must have been written

between September 1, 1910, and the last of December of that year. According to the testimony of Mrs. Elizabeth Schofield, the daughter of the parties, after that time the libellant came down to Philadelphia, and her mother and father together rented the house No. 2210 Oxford Street, and he remained a week or two at the latter place and then came back to Lancaster. If this testimony is true (and it is supported by their son, Raymond D. Steiger, as well as by the respondent), the libellant lived with the respondent in Philadelphia after he received the letter. It has been held, by Sulzberger, P. J., in Gauntt *vs.* Gauntt, 16 Dist. Rep., 135, that such conduct on the part of the libellant is evidence of condonation. The learned judge there said: "This is very persuasive evidence that the wrongs he is said to have done her were forgiven and that she was willing to live with him while he behaved himself well. Since that day, he has committed no act of which she complains, and there is no evidence before us to impair the value of the libellant's act as evidence of condonation. We cannot, as the learned master seems to have done, wholly disregard so important an item of evidence." In the present case, one act is complained of which occurred after the libellant came back to Lancaster.

The learned counsel for the libellant seems to be of the impression that, because he has presented facts upon which, if believed, a divorce might be granted, these facts must be taken as true and the Court must act solely upon them; and he seems to ignore entirely the evidence taken on the part of the respondent. The law requires him to prove his case by a preponderance of the evidence. After carefully examining all the evidence, we have come to the conclusion that he has failed to do this. His charges, as we have above said, rest upon his unsupported testimony, and this is denied by the respondent in whole and by his son and daughter in part. Under the circumstances, it can hardly be said that he has proved his case in the manner thus required. As was said by the master, this case should have been referred to a jury to determine the truth of the facts presented, and as that course was not pursued, we feel that we would not be warranted, under all the evidence before us, in entering a decree.

The exceptions to the master's report are, therefore, overruled, the conclusions set forth in the master's report are adopted, and the libel is dismissed at the cost of the libellant.

REILLY & RAUB *vs.* WIDMYER & KINARD.

Party Walls—Use of.

A joint owner of a party wall erected under an agreement made by the parties and standing half upon the land of each, may use the side of the wall resting upon his land for any purpose which does not impair its strength or interfere with its use as a party wall, and therefore will not be enjoined from painting a business sign on the open face of such wall on his side continued above the roof of his building.

In the Court of Common Pleas of Lancaster County. Equity Docket No. 5, page 140. Bill for injunction. Motion to dissolve preliminary injunction.

Wm. R. Brinton and Richard M. Reilly, for Plaintiff.
John E. Malone, for Defendant.

March 20, 1913. Opinion by Landis, P. J.

FINDINGS OF FACT.

The facts out of which this controversy arises are practically undisputed. Richard M. Reilly and Harry L. Raub, on March 10, 1911, purchased from A. C. Kepler certain premises, situated on the west side of North Queen Street, between West King and West Orange Streets, in the city of Lancaster; and in the spring of 1911, they erected thereon a four-story brick business building, now known as Nos. 44 and 46 North Queen Street. Harry L. Raub died on June 3, 1911, leaving a last will and testament, and he therein directed, inter alia, that his interest in these premises should be sold by his executor. He appointed Amos K Raub, one of the defendants, to that office. The interest of the decedent in the property has not yet been disposed of.

Charles F. Widmyer and John W. Kinard are the owners of certain property situated on said North Queen Street, adjoining the premises of the plaintiffs on the

north. About the same time, these parties also erected, on their land, a four-story business building, known as Nos. 48 and 50 North Queen Street.

It appears that, in contemplation of the erection of these respective structures, the parties, on March 23, 1911, executed the following agreement:

"That, whereas, the said parties of the first part are seized and possessed of a certain lot or piece of ground, with the buildings thereon erected, known as Nos. 44 and 46 North Queen Street, in said City of Lancaster, and the said parties of the second part are seized and possessed of a certain lot or piece of ground, with the buildings thereon erected, known as Nos. 48 and 50 North Queen Street, said properties being situated adjoining each other on the west side of said North Queen Street, between Center Square and Orange Street in said city.

"And, whereas, they have erected between their said properties a brick division wall; said wall beginning at the building line on North Queen Street and extending westward a distance of one hundred and one feet and six inches (101′ 6″), and having a width throughout of eighteen inches (18″); the division line between said two properties being in the middle of the aforesaid wall.

"Now, therefore, it is understood and agreed between the parties hereto that said wall shall be considered and is a party wall; and it is further understood and agreed that either of the parties hereto or his or their heirs or assigns may extend said wall upward and may rebuild the same, in case of partial or total destruction thereof . . . ."

In pursuance of this agreement, a brick division wall was erected between the said properties, the building of the plaintiffs extending, however, about fifteen or twenty feet higher than the building of the defendants. The building of the plaintiffs is now used for the purposes of a wholesale and retail hardware store, and that of the defendants for the business of insurance and other purposes.

Shortly before the present bill was filed, Charles F. Widmyer, one of the defendants, made a contract with Charles H. Tucker, for the painting of a sign on the north face of the party wall above the building of the defendants. It was proposed to paint thereon a sign of the

Widmyer-Prangley Company, Fire Insurance, and the office location, street number, and so forth. The sign was to be about ten or twelve feet high and possibly fifteen or eighteen feet wide. No instructions were given as to how this work should be done; but Mr. Tucker's men, having started it, fastened their ladders by iron hooks to the top of the wall, and held the hooks in place by ropes, one to the flag pole and the other to the chimney on the Reilly and Raub building. It was proven that the painting of this sign on the party wall would be an annoyance to the plaintiffs in the occupancy of their building, and it is for the purpose of preventing the wall from being used in this manner that the present bill has been filed.

CONCLUSIONS OF LAW.

The sole proposition which is presented for decision is, whether a joint owner of a party wall, erected under an agreement made by the parties, and standing half upon the respective properties of such adjoiners, may use the side of the wall resting upon his land for any purpose, so long as he does not impair its strength nor interfere with the purposes for which it was erected.

So far as my investigation has gone, and also so far as my attention has been directed by the learned counsel in this case, there are but two decisions in Pennsylvania which can be claimed to be pertinent to the present issue. These cases were decided by the lower courts, but they seem to be based upon proper principles, and I, therefore, carefully set them out, so that it can be seen whether they are governing authorities in the present contention.

The first of them is Wistar *vs.* American Baptist Publication Society, 2 W. N. C., 333. There, the bill set forth that the plaintiff was the owner of a building in the City of Philadelphia, and that the defendant had a large five-story building adjoining, on the east; that there was between them a party wall, which was partly on the complainant's land and partly on that of the defendant, and that the defendant's building overtopped that of the plaintiff about two and a half stories; that when the wall was built, to avoid an unsightly erection, the plaintiff paid the bricklayer to have a better quality of brick for facing placed on his side. The ground of the complaint was, that the defendant was proceeding to paint the projecting portion of the wall white, preparatory to painting

a large sign on it. An injunction was prayed for, and, without an opinion, was granted by the court.

In Bedell *vs.* The Rittenhouse Company, 5 Dist. Rep., 689, the complainant averred that he was the owner of a dwelling house, located at the southeast corner of Chestnut and Twenty-second Streets, in the City of Philadelphia; that the east wall of the same was a party wall; that one, Sharp, built an apartment house on the east, and, in doing so, used the party wall and raised it to an additional height of about forty feet; that this wall was built solid, except that about forty feet south of Chestnut Street, there were three openings, nine feet wide by ten feet high, and between the openings the wall was not of brick, but consisted in each case of double iron beams nine inches wide by twelve inches thick, placed about flush with the westernmost, or plaintiff's side of the wall. Subsequently, the defendant caused the words, "The Rittenhouse," to be painted on the west face of the party wall, and the plaintiff, alleging that such use of the party wall was unauthorized, demanded the removal of the sign. It was averred that the sign subjected the plaintiff and his family to annoyance by reason of misleading persons to mistake his dwelling for a part of the defendant's business premises. Upon this state of facts, an injunction was granted. Sulzberger, J., in delivering the opinion, said: "A party wall must be a dead or solid wall. By making openings in it, the builder becomes a trespasser: Milne's Appeal, 81 Pa., 54. To this rule, there is the solitary exception defined in McCall's Appeal, 16 W. N. C., 95, where openings were left in three places, above the height of sixteen feet, to form recesses for light and air . . . The purpose of a party wall is apparent from the Act of 1721. The next builder is given the right, on payment of his share of the cost, to make use of it, which is the consideration upon which the entry on another man's land is allowed. Its primary purpose is plainly for support. Its ground is mutual benefit: Rodearmel *vs.* Hutchinson, 2 Pears, 324." It was also added that "a use of the wall by the defendant for the purpose of a sign, which subjects the plaintiff to inconvenience and annoyance, is one not contemplated by the law."

A study of the facts of these cases will, however, show that the party complained against was attempting

to use, not its own, but that portion of the wall which was located on its neighbor's land; that is, the face of the party wall upon which it was attempting to paint was not on ground of its own, but it was asserting a right, by reason of joint ownership of the party wall, to use for these purposes the side of the party wall which rested upon its neighbor's land. In my judgment, such a position was properly not sustained.

There is, however, a marked distinction between using one's own ground and using that of one's neighbor, and the defendant's claim in this case, therefore, rests upon a different basis. The maxim of the common law is cujus est solum, ejus est absque ad coelum. One who owns land owns it everywhere to the skies, and except where he has modified that right by contract, or the law, for the common good, may restrict it, he has an unlimited right to enjoy his property. A consideration of the case from the basis of ownership of the land is, therefore, necessary.

In 22 Amer. & Eng. Encycl. of Law, page 242 (2nd edition), it is said that "the right of one of two coterminous proprietors to erect a wall standing partly on the land of the other does not exist at common law without the other's consent. It exists by statute, irrespective of consent, and may, of course, with the mutual consent of the owners, be based on contract." In Kirby *vs.* Fitzpatrick, 168 Pa., 434, Mr. Justice Fell, in speaking of party walls, said: "This right is statutory. It is not a right at any time and for any purpose to use the land of another, but only for the purpose and in the manner provided. The extent of the use, subject to the limitations imposed, is to be determined by the character and size of the building to be erected, and is within the discretion of the inspectors. The builder should not be permitted to take more of his neighbor's land than he needs for the purpose of his building. The whole system of party-wall legislation rests upon the principle of mutuality of burdens and benefits." In 22 Amer. & Eng. Encycl. of Law, page 244 (2nd edition), it is said that "each of the adjoining owners of a party wall has a right to use the whole of his own side thereof, if such use does not conflict with the equal rights of the other owner." In 2 Washburn on Real Property, page 386 (5th edition), it is said by the Text

Writer that "building a wall at a joint expense by two parties, which stands one-half upon the land of each, does not make them tenants in common thereof. Each owns his part in severalty, though each has a right to use the wall as an easement."

In Fidelity Lodge, No. 59, I. O. O. F., New Castle, *vs.* Bond, 45 N. E. Rep., 338, the Supreme Court of Indiana, by Howard, J., in discussing this subject, said: "Upon the other theory, namely, that, by reason of its equal interest in the two-story party wall, it had an exclusive right to run up and use said wall for its third story, appellant must also fail. Unless by agreement, either express or by necessary implication (in the absence of a statute), there can be no such thing as a party wall for the use of one of the parties to the exclusion of the other. A party wall has been defined to be a structure for the common benefit and convenience of both the tenements which it separates, and either party may use it. Such a wall is a substitute for a separate wall to each adjoining owner, and neither may impair its value as to the other. The ownership has sometimes, though perhaps incorrectly, been said to be that of tenants in common. There can, however, be no partition, and the ownership is rather joint or by entireties, each owner having the full right to the use of the whole wall, so far, at least, as his own side is concerned, and provided only such use does not conflict with the equal right of the other party. A better holding, as we think, and that which seems to obtain in this jurisdiction, is, that each adjoining proprietor is the owner in severalty of his part, both of the wall and of the land on which it stands, subject to a cross easement of support and for other common needs in favor of the other proprietor." Placing doors and windows in a party wall may be enjoined: Harbe *vs.* Evans, 14 S. W. Rep., 750 (Missouri).

In Shiverick et al. *vs.* R. J. Gunning Company, 78 N. W. Rep., 460 (Nebraska), the very question here arising was considered. Charles Shiverick & Company was a partnership, engaged in the furniture and carpet business in the City of Omaha, occupying as lessee the four-story building situate on the west one-third of lot 8 in block 103 in said city. John McCreary was the owner of the said west one-third of lot 8, and the east two-thirds of said lot

was owned by one Samuel E. Rogers. McCreary being about to erect a building on his portion of said lot, he and Rogers entered into a party-wall contract, whereby it was agreed that they should unite in building a party wall on the line dividing the said premises, one-half of the wall to stand upon the property of each, and one-half of the costs of construction to be paid by each. The wall was erected and the costs paid according to contract, and McCreary, at the same time, erected a four-story brick building on his portion of the lot, using the said party wall as the eastern wall of his building. No building was erected on the east two-thirds of said lot 8. In November, 1890, McCreary leased to the R. J. Gunning Company the east or outside surface of said party wall, to be used for advertising purposes, and immediately thereafter, S. G. Higgins, the then owner of the said east two-thirds of said lot 8, notified the agent of the R. J. Gunning Company that he was the owner of the east half of said wall, and, on Mr. McCreary's attention being called to the matter, he paid back the money which he had received as rent, and the lease was surrendered to him. Thereupon, the R. J. Gunning Company entered into a lease with Higgins for the east half of said party wall for the term of two years. On May 22, 1893, said company entered into a new lease for said wall with the then owner of said east two-thirds of lot 8 for two years, for advertising purposes, and on October 17, 1894, the lease was renewed for another year. In 1890, in pursuance of the lease with Higgins, the R. J. Gunning Company caused to be painted upon the east surface of said party wall a Durham tobacco sign, 108½ feet long and 50 feet high, advertising Blackwell's Durham tobacco. The lettering on the sign was, "Smoke Blackwell's Genuine Durham Tobacco." Besides, there was a picture of a large Durham bull, occupying a space of 18 feet by 35 feet. This sign remained on the east surface of the party wall until July, 1893, or a month after Charles Shiverick & Company entered the building as tenants, when the R. J. Gunning Company brightened up the signs with a fresh coat of paint. Charles Shiverick & Company at the time protested against the revival of the sign, and asserted the right to put its sign on the building, and requested the R. J. Gunning Company to paint the same, which the latter

declined to do. In October of the same year, Charles Shiverick & Company obliterated said Durham tobacco sign, and painted its own sign upon said wall. In March, 1894, the R. J. Gunning Company effaced this last sign, and replaced upon the wall the Durham tobacco sign, which last sign was painted out by Charles Shiverick & Company, and its own sign was again placed upon the wall. The following August, the R. J. Gunning Company again replaced the Durham tobacco sign on the wall, and during the night following it was painted out by Charles Shiverick & Company. Suit was then brought by the R. J. Gunning Company to recover damages alleged to have been sustained by reason of the painting out of said sign by Charles Shiverick & Company, and the plaintiff secured a verdict. Upon an appeal, the judgment was sustained. The Court (Norval, J.), said: "The wall in question was built by two adjoining lot owners under a written contract, so that one-half of the wall, divided longitudinally, rested on the one's lot and the other half on the other's lot. Each party to the agreement paid one-half of the cost of constructing the wall, and each was the owner in severalty of the portion thereof that stood upon his land, subject to the easement or right in the other to have it support the building which he might erect and attach to or connect with the wall. The fact that the agreement under which the wall was erected speaks 'of the joint ownership of said wall by said parties in equal proportions' does not take the case out of the rule governing party walls. A consideration of the entire contract in connection with the practical interpretation placed thereon by the parties thereto discloses that the wall was nevertheless a party wall, not owned either jointly or as tenants in common by the proprietors of the soil, but each possessed the portion of the wall which stood on his lot, subject to the cross easement of support in favor of the owner of the other lot and part of the wall. Sullivan *vs.* Graffort, 35 Iowa, 531; Dauenhauer *vs.* Devine, 51 Tex., 480; Burton *vs.* Moffit, 3 Or., 29; Bloch *vs.* Isham, 28 Ind., 37; Sherred *vs.* Cisco, 4 Sandf., 480. 'Land covered by a party wall remains the several property of the owner of each half, but the title of each owner is qualified by the easement to which the other is entitled of supporting his building by means of

the half of the wall belonging to his neighbor. The only proper easement attached to a party wall is the easement of support.' It does not include the right to go upon the land of the other. The easement of support is all that either can convey. Ingals *vs.* Plamondon, 75 Ill., 118; Gibson *vs.* Holden, 115 Ill., 199; 3 N. E., 282. In Hoffman *vs.* Kuhn, 57 Miss., 746, Chalmer, J., said: "The owners of adjoining buildings connected by a party wall resting partly upon the soil of each are neither joint owners nor tenants in common of the wall. Each is possessed in severalty of his own soil up to the dividing line, and of that portion of the wall which rests upon it; but the soil of each, with the wall belonging to him, is burdened with an easement or servitude in favor of the other, to the end that it may afford a support to the wall and building of each other. Each, therefore, is bound to permit his portion of the wall to stand, and to do no act to impair or endanger the strength of his neighbor's portion, so long as the object for which it was erected, to wit, the common support of the two buildings, can be subserved; and each will consequently be liable to the other for any damage sustained by a disregard of this obligation. But the obligation ceases with the purpose for which it was assumed, namely, the support of the houses of which the wall forms a part.' In Andrae *vs.* Haseltine, 58 Wis., 395, 17 N. W., 18, Lyon, J., in speaking of party walls, observed: 'It seems to be the settled law that the owners of a party wall standing in part upon the lot of each are not tenants in common of the wall, but that each owns in severalty so much thereof as stands upon his lot, subject to easement of the other owner for its support, and the equal use thereof as an exterior wall of his building. Such being the tenure by which the wall is held and owned, it seems logically to follow that either owner may, at least upon his own land, do anything with the wall, or make any use of it, which does not interfere with or impair the enjoyment of such easement by the other owner.' "

In Lappan *vs.* Glunz, 104 N. W. Rep., 26 (Mich.), a party-wall agreement was made between two adjoining lot holders, which set forth that "said wall, when constructed and as it progresses in construction without expense to said second party, his heirs or representatives, shall be the common property of both of said parties in

equal proportions, and that said second party, his heirs and representatives, shall have full and unquestioned right to build thereto, and use the same according to the custom of partition walls." In pursuance thereof, one of them built upon his ground a double brick building, three stories in height. The other party, who did not build, leased the east face of the party wall, which was upon his land, to Fleishman & Company, and others, for advertising purposes. Thereupon the plaintiff filed his bill, praying for an injunction to restrain the defendant from painting or causing to be painted any sign, color, advertising, and so forth, on the east wall, and she alleged that the same greatly depreciated the rental value of her store and flats, and thereby damaged her property. It was held that the defendant had a right to use the east face of the wall for proper advertising purposes, and the decree of the Court below was, therefore, affirmed.

A party wall is solely for the purpose of support, and outside of this the respective parties may use their land uninterfered with by the adjoining owner. Therefore, the surface of the party wall enclosed within the houses of which it forms part may be used by the respective parties as they see fit, for that portion is upon their land, and that use does not impair the purposes for which the wall was erected. If the wall is part of a building, can not the owner paint or paper it, or ornament it, according to his own pleasure? Ought there to be any diminution of right in the owner of the land to use the face of the wall which rests on his property because he has not erected a building upon it, or because he has not seen fit to build his building to its utmost height? I am of the opinion that his right to do this is thereby unimpaired, and that, for the reasons above given, the preliminary injunction granted in this case ought to be dissolved, and the bill dismissed at the costs of the plaintiff.

Preliminary injunction dissolved and bill dismissed.

Counsel may prepare a decree to that effect.

NEW SCHILLER BUILDING AND LOAN ASSO'N *vs.* GEORGE J. SCHAUTZ AND F. W. LANGE.

Building Association—Payment of Loan—Authority of Secretary.

Where for several years the secretary of a building and loan association, with the acquiescence of the board of directors, had settled the accounts of borrowing stockholders, received most of the payments, and was to all intents and purposes the manager of its business, a cash payment to the secretary by a borrower, in settlement of his mortgage, is a valid payment to the association and binding upon it.

A payment in bank stock, received by the secretary in settlement of a loan from the association, although prima facie illegal, becomes binding upon the association when used for its benefit, and cannot afterward be repudiated by it on the ground that the act of the secretary was ultra vires.

Rule to open judgment. In the Court of Common Pleas of Lackawanna County. No. 999 March Term, 1911.

P. W. Stokes, for Plaintiff.
H. C. Reynolds and F. Donnelly, for Defendants.

Edwards, P. J., May 11, 1913—Judgment was originally entered in this case upon a bond, accompanying a mortgage, and an affidavit of default was filed in June, 1911, claiming $4,064 as the amount due on the bond and mortgage. The defendant came into court and obtained a rule to show cause why the judgment should not be opened, alleging payment of the mortgage in full. After the case was at issue the parties agreed in writing to submit the case to the court for trial without a jury.

We make the following specific findings:

FACTS.

1. The plaintiff is a building and loan association incorporated under the laws of Pennsylvania. In August, 1905, the defendants became the owners of fifteen shares of the stock of the association; and, in the same month secured a loan of $3,000 from the association, giving a mortgage on certain property in Scranton as security, and assigning to the association the fifteen shares of stock. By the terms of the bond and mortgage the monthly payments to be made by defendants were fifteen dollars dues on stock and fifteen dollars interest.

2. The fifteen shares of stock owned by the defendants were in the association's 23d series, which had been started a few months before the loan was made; so that

in August, 1905, the date of the loan, the sum of $45, being the value of defendants' stock, was deducted from the loan of $3,000. The payments made subsequently by the defendants are as follows:

November, 1906	$450.00
February, 1907	50.00
March, 1907	100.00
April, 1907	50.00
June, 1907	50.00
July, 1907	50.00

3. On August 17, 1907, George J. Schautz, one of the defendants, gave to the other defendant, F. W. Lange, two checks, one for $1,398.65 and one for $55.70; and on the next day F. W. Lange paid in cash to L. A. Lange, the secretary, the sum of $1,500, receiving the following receipt from the secretary:

"Scranton, Pa., Aug. 18, 1907.

"Received from F. W. Lange fourteen hundred and fifty-three for Geo. Schautz interest in Lange & Schautz mortgage in New Schiller Building and Loan Association.
$1453.00 L. A. Lange, Secty."

There is some discrepancy in the figures pertaining to this transaction. The receipt, for instance, is $1.35 less than the amount of the two checks; and the $1,500 paid by F. W. Lange to the secretary is $47 in excess of the amount of the receipt. Notwithstanding these differences, we cannot evade the conclusion that on August 18, 1907, F. W. Lange paid to the secretary the sum of $1,500 to apply on defendants' mortgage. This we find as a fact. The payment, as between the secretary and the two mortgagors, was intended to cover Schautz's one-half of the indebtedness under the mortgage. The evidence is all on one side as to the fact of the payment to the secretary. The checks, the receipt, the testimony of F. W. Lange and the subsequent admissions of the secretary in the presence of Mr. and Mrs. Schautz—all point to the same conclusion. Whether the payment of the $1,500 to the secretary was a payment to the association is a question of law, and will be discussed by us elsewhere.

4. The evidence establishes beyond question the fact that the board of directors of the plaintiff association had the utmost confidence in the secretary, who held his office for thirteen years, until some time in 1910, when he

absconded. During this entire period the majority of the board of directors remained the same, and there was no change in the personnel of the offices of president, vice-president and treasurer. The association did an extensive business, having about four thousand accounts. The secretary was paid a salary and commissions, amounting in some years to eight and ten thousand dollars, and in one year as high as fourteen thousand dollars. He had control of the office and of the employes and had in his charge all the books of the association. Not only did he perform the work of secretary, but he assumed the duties of the president and treasurer, so far as their actual work was concerned, except that he did not sign the names of these officers to papers requiring their signatures, although such papers were signed by the officers, in a perfunctory way, whenever requested by the secretary. Indeed, we would say, that the secretary was in the substantial control of the business and finances of the association from 1897 to 1910. The board of directors met twice in each month and at these meetings, known as "pay nights," moneys were paid in by stockholders; but seventy-five per cent. of the moneys received by the association was paid to the secretary, and practically all the money was deposited in the banks by the secretary, much of it in his own name, but not as secretary. The defendants' seventh request for a finding of fact enumerates the acts performed by the secretary, during his incumbency of his office. We affirm the request in substance. It is a fairly accurate statement of the things done by the secretary, from year to year, some of them, some times, with the cooperation of the officers of the association, and, at all times without objection on the part of the board of directors. We particularly refer to the fact that the secretary settled the accounts of the borrowing stockholders, as a general rule. He it was who determined the value of the stock when a borrower repaid his loan, and he it was who received the moneys in repayment and settlement of the mortgages, depositing these moneys generally in his own individual account, in one bank or another. When he absconded the shortage in his accounts was from $75,000 to $100,000, and a large part of this sum was made up of moneys received by him in settlement of loans secured by mortgages.

5. We have stated in our third finding of fact how Schautz, one of the defendants, claims to have paid his part of the joint loan. The other mortgagor, F. W. Lange, claims to have paid his share of the loan in the following manner. F. W. Lange was the owner of eight shares of the capital stock of the Peoples' National Bank of Scranton. About the time the Schautz part of the loan was settled the secretary suggested to F. W. Lange that he transfer to him, the secretary, the said eight shares of bank stock in settlement of the balance due on the mortgage. F. W. Lange agreed to this proposition, and he transferred the bank stock to his brother, the secretary, who said that he would have the mortgage satisfied. F. W. Lange did not get a receipt at the time, but he received one later. It reads thus:

"Scranton, Pa., April 28, 1909.

"Received from F. W. Lange fourteen hundred eight dollars to apply on repayment of mortgage of Lange and Schautz in New Schiller Building and Loan Association.

$1408.00. L. A. Lange, Secty."

On the back of this receipt is endorsed:

"Being the value of eight shares of Peoples Bank stock given to me as settlement for same."

The evidence establishes the facts of the foregoing transaction as detailed by us, and we so find them; but whether they constitute a payment to the association of F. W. Lange's indebtedness is another question to be discussed by us elsewhere.

6. Bearing upon the transaction referred to in the preceding finding, it appears, from the evidence, that the association, through its secretary and officers, borrowed various sums of moneys from several banks in the city, to be reloaned to the members of the association. This was done for several years, and the sums so borrowed ranged from twenty to eighty thousand dollars per annum. As a general rule the money was borrowed on promissory notes signed or endorsed by the secretary, president and treasurer, in their individual names and not as officers of the association. One such note for $5,000 was discounted at the Traders National Bank in April, 1908. As additional security there was pledged with the bank sixteen shares of the Peoples National

Bank stock. Eight of these shares were those transferred by F. W. Lange to the secretary in 1907, in an attempt to pay his part of the mortgage above referred to. The money obtained on the note thus discounted was for the benefit of the association. The note was renewed from time to time and some payments made on it by the association, but finally the sixteen shares of bank stock was sold or forfeited by the Traders Bank. In this way F. W. Lange lost his eight shares of bank stock. This stock, according to one witness, was worth $185 per share; but we fix the value of it at the price agreed upon by the parties concerned, viz., $1408.

7. The amount paid by Schautz, as per receipt of August 18, 1907, using the figures on the receipt, to wit, $1,453, and the value of F. W. Lange's eight shares of bank stock, fixed at $1,408, were together more than sufficient to pay the amount due on the mortgage. The settlement was made on the basis of a deduction covering the value of the fifteen shares of stock. According to our own calculation our conclusion in this respect is verified. The actual amount paid for Schautz to apply on the mortgage was $1,500, although the secretary fixed the one-half of the indebtedness at $1,453.

CONCLUSIONS OF LAW AND DISCUSSION.

Eliminating all irrelevant matter and reducing the controversy to its lowest terms, we find only two questions that require consideration in this case.

1. Was the payment made to the secretary for Schautz a payment to the association?

2. Is the association bound by the transaction relating to the bank stock between F. W. Lange and the secretary?

We may say, in an introductory way, that the evidence before us discloses a remarkable condition of affairs. We have seen no case in the books, nor do we know of any case, where a board of directors has allowed its secretary such unlimited sway over the affairs of an association, as is shown in this case. To all intents and purposes, the secretary of the New Schiller Building and Loan Association was the manager of its business for a number of years. Whether this was because the board of directors had the most absolute confidence in their

secretary, or because of the inattention of the board to its duties, the fact remains unchanged that by acquiescence from year to year, and sometimes by express approval, the board allowed its secretary to perform every duty, his own and that of the other officers. He was the actual president, treasurer and secretary. Whenever it was necessary to obtain the signatures of the president and treasurer on notes, checks and orders, he obtained them; but the transactions themselves were consummated by him. He received most of the money for the association; he fixed the basis of settlement with each borrowing stockholder; he determined the amount to be allowed on the stock in such settlements; he appointed the appraisers on valuation of real estate; he negotiated numerous loans for the association, in his own individual name and that of his fellow-officers; and he deposited the money derived from these loans, as well as the money paid by mortgagors in settlement of their debts, in his own name in several banks, and whenever necessary drew his own checks payable to the treasurer, and endorsed them for deposit to the credit of the treasurer in the one account kept in his name, without the endorsement of the treasurer himself on such checks. And particularly, as pertinent to one of the issues in this case, the transactions as to the mortgage loans, paid to the secretary from time to time, were approved by the board and the mortgages satisfied of record. Indeed, the president of the association, in his testimony, says that the payment of such loans to the secretary were recognized and ratified by the board and the mortgages satisfied, as a general rule. There was objection to the satisfaction of the mortgage in this case because of the peculiar circumstances under which the payments were alleged to have been made: (1), Because there was a doubt as to the payment to the secretary by F. W. Lange of the Schautz half of the mortgage; and (2), because the payment, by bank stock, of the Lange half of the loan, was not a valid payment in law.

It is useless to cite authorities on the question of the validity of the payment of the Schautz part of the mortgage. We have found as a fact that the payment was actually made to the secretary; and, considering the relation of the secretary to the association, and the ratifi-

cation by the board of the secretary's many settlements in such cases, we find as our first conclusion of law:

That the payment made to the secretary on behalf of Schautz on April 18, 1907, to apply on the mortgage was a valid payment and was binding upon the plaintiff.

2. Was the transfer by F. W. Lange of the bank stock to the secretary binding upon the association?

This is an entirely different question from the first, and must be considered on a different basis. Conceding the power in the secretary to settle loans because of the recognition of this power by the board of directors, even then he had no right to take bank stock in payment of a mortgage. He had a right to take cash and the association would be bound by his act in that case. If the association is bound by the bank stock transaction, it is because of the application of another principle of law. The facts relating to this transaction are clear, and are detailed by us in our sixth finding of fact. Can the association, after receiving the proceeds of the bank stock security, repudiate the transaction? However irregular and illegal the act of the secretary in taking the bank stock of the defendant as part payment on the mortgage, if the association reaped the benefit of the act it cannot now repudiate the arrangement. As was said by Mr. Justice Paxson, in Jones *vs.* Building Association, 94 Pa. 215:

"The contention on the part of the association, plaintiff, is, that the secretary had no authority to make the representations by which Jones was induced to sign the note as surety; that it was therefore a fraud and not binding on said association—that is to say, the latter could repudiate the fraud, and yet hold on to its fruits. This cannot be done. Common honesty and the law of the land alike forbid it. Whether the association was incorporated or unincorporated, whether the secretary was or was not authorized to make the representations to Jones, it is clear the association cannot have the benefit of the security and at the same time repudiate the contract by means of which they obtained it. No principle of law is better settled than that a man cannot reap the fruits of his agent's fraud: Musser *vs.* Hyde, 2 W. & S. 314; Hunt *vs.* Moore, 2 Barr 105; Mundorff *vs.* Wickersham, 13 P. F. Smith 87; Keough *vs.* Leslie, 11 Norris 424.

The association took this security cum onere, and the maxim qui sentit commodum sentire debet et onus applies."

Our second conclusion of law, therefore, is that the defendant Lange is entitled to a credit on the said mortgage of a sum equal to the value of the eight shares of the stock of the Peoples National Bank.

Our third conclusion of law is, that the said mortgage, having been fully paid, judgment in this case should be entered for the defendants.

Now, May 19, 1913, the prothonotary is directed to file the foregoing decision and to give notice thereof forthwith to the parties or their attorneys.

Exceptions sec. leg.

BRAUCHER *vs.* BOROUGH OF SOMERSET.

Boroughs—Grading—Streets—Damages.

Damages to a lot owner by grading a street along previously opened may be recovered, including damages from changing grade of sidewalk, even though such grading of sidewalk has not actually been done.

In the Court of Common Pleas of Somerset County, No. 23, December Term, 1912.

C. W. Walker and Alexander King, for Plaintiff.
Norman T. Boose, for Defendant.

Opinion by Ruppel, P. J., July 28th, 1913:

HISTORY OF CASE.

Plaintiff was owner of a lot fronting on a street long before laid out and used by the public, adjusting the elevation of his building which he erected to the grade of street as it then existed; a grade had not been established by the borough. After the building was up and occupied, the borough established a grade and cut down the cartway of the street to a depth of about 5 feet. The pavement was not cut down, left remain as it was when building erected, but owner had no means of access to his house for putting in coal, etc.

He proceeded by petition under the act and viewers made report, from which borough appealed and the case was tried before a jury. On this trial defendant (borough) contended that plaintiff was not entitled to prove or recover damages that might be caused by cutting down the sidewalk to the grade of the cartway, which it had established and to which grade the cartway was cut down, because the sidewalk or pavement part of the street had not been cut down. This position the judge denied and instructed the jury "to estimate the damages as they will be when the sidewalk is lowered."

QUESTION INVOLVED.

Is plaintiff entitled to recover all the damage that may result to his property by grading the street on which property abuts, which had previously been laid out and used, where only the cartway is graded, or shall the jury estimate damages including such as may be caused when the pavement or sidewalk is graded?

Only one of the reasons assigned for new trial is urged in the argument by the counsel for the borough, namely, that the Court was in error in the charge to the jury in reference to the lowering of the sidewalk. That portion of the charge complained of reads as follows:

"We say to you as a matter of law that under this ordinance and under the acts of the borough you shall estimate the damages as they will be when the sidewalk is lowered; there cannot be two suits for the same injury to this property, and all damages that are done by the grading of that street must be settled in this suit, and therefore, your verdict will be based upon the damages that plaintiff has sustained, including the lowering of the pavement down to the level of the cartway."

As the evidence showed that the borough had only lowered the grade of the street proper, or driveway and not the sidewalk, it is argued that the jury should have been directed to find only such damages as were sustained by reason of the work already done, and that if the borough subsequently concluded to lower the sidewalk, then the damages will have to be ascertained and paid after that is done, and to the person who is the owner of the property at that time. It developed at the trial of the case that since the street was graded, the plaintiff, Braucher, had sold the property to Dr. E. F. Shaulis, and

the borough solicitor now contends that when the sidewalks are lowered Dr. Shaulis will have a claim against the borough for whatever damages may be occasioned thereby. The ordinance under which the work was done reads as follows:

"An Ordinance fixing and establishing the grades of the east and west curb lines of East street from the south curb line of Catharine street to the southern line of Somerset borough.

"Sec. 1. Be it ordained, etc., that the east curb line of East Street from the south curb line of Catharine Street to the southern line of Somerset Borough be fixed and established as follows, to wit: Beginning at the south curb line of Catharine Street at an elevation of 2,153 feet above borough datum, thence rising at the rate of 9.58 feet per 100 feet for a distance of 290.8 feet to the north curb line of North Street, etc.

"Sec. 2. That the west curb line of East Street from the south curb line of Catharine Street to the south borough line be fixed and established as follows, to wit: Beginning at the south curb line of Catharine Street at an elevation of 2,153.9 feet above borough datum, thence rising at the rate of 9.58 feet per 100 feet for a distance of 290.8 feet to the south line of North Street, etc."

The above two lines as described pass the plaintiff's property, which is bounded on the east by East Street, and on the south by North Street.

This ordinance was adopted by the borough council on the 10th of April, 1911, approved by the burgess on the 27th of April, 1911.

On the 19th of April, 1912, pursuant to the above ordinance, the council resolved, "that . . . North East Street from North Street to Catharine Street . . . . be graded and improved according to plans prepared by the borough engineer, F. B. Fluck," etc.

It will be noticed that the ordinance is specific as to the point at which the grade line is to be determined, namely, the curb. The street proper when referred to in the ordinance includes the driveway, the gutters on either side, the curbing on both sides of the cartway, and the sidewalks. It is a well-known fact that the curbing is set several inches above the level of the cartway at the gutters; and it is also well known that the center of the

driveway is usually several inches higher than the edge of the gutters; it is a well-known fact that the sidewalks are usually on a level with the top of the curbing, and therefore, when the council fixed a particular point at which the grade was designated, I take it that it was meant thereby to have the other grades conform to the general rule or practice with regard to the grading of streets. There is nothing in the ordinance or in the resolution or any act of the council indicating an intention to allow the sidewalks to remain elevated some distance above the grade line of the street, and when the plaintiff was notified that the grade had been established as per this ordinance, he had a right to assume that it meant the grading of the entire width of the street between property lines. He also had a right to commence his action or proceedings against the borough the instant the work was commenced pursuant to the action of the council. He was not obliged to wait until the work was completed, and therefore had a right to assume that it was the intention of the borough to lower the sidewalks as well as the driveway.

Counsel for the defendant cites two cases in support of his view, that the lowering of the sidewalks is not to be considered as an element in the present case. Wilson *vs.* Beaver Borough, 13 Pa. C. C. Rep., 75, in which Judge Wickham says:

"In the present case, the ordinance has been carried out to the extent of cutting down the street to the inner line of the sidewalk. The original or natural grade has been preserved and left untouched between the inner line of the sidewalk and the property line."

The first point of the plaintiff was:

"That the jury in their estimation of damages, if any, to the property in question must treat the street as if opened to the property line."

"Answer. This point as worded can be and is affirmed. The borough has the right to open the street to its full width, and it is already opened to that extent. If the word 'opened' means graded, and I presume that is what was meant, then the point is refused."

The charge, however, seems to clear up this apparent confusion, for the Judge instructs the jury:

"Consider how much, if at all, the property has been

injured in market value by that work, as of the time I mention. And also by the conceded right of the borough authorities to cut down the street to the sidewalk level up to the property line. You are not to look at this matter as if the cut was actually made to the property line, but you must consider the right of the borough to make that cut under its ordinance, if it sees fit to do so, hereafter; . . . Now, how much less, if anything, would parties desiring to buy such property have offered or given for it in 1891, they having a knowledge of its then actual condition, of the physical change made on the street, and also a knowledge of the right of the borough authorities to cut down some more of the street, if they choose to exercise that right."

The other case cited, McCurdy *vs.* Lineville Borough, 10 Pa. D. R., 546, is an opinion by President Judge Thomas on exceptions filed to the report of viewers; and as the exceptions are not given, the opinion throws very little light on this controverted question; and a careful examination of these two cases has not changed my opinion with regard to the correctness of the rule laid down in the charge to the jury.

In Pusey *vs.* City of Allegheny, 98 Pa., 522, the controversy arose over the claim for opening and grading a street; the city claiming that the plaintiff could only recover upon one ground in one form of action, and this view was sustained by the court below, but the Supreme Court in reversing, says:

"Hence the plaintiff was entitled to recover whatever damages she had suffered at the hands of the city, whether direct or consequential, and the contention that she must divide her claim, and recover for the property appropriated for the street, under the Act of 1870, and for the injury resulting from the cutting and grading by a different process under the Act of 1876, cannot be sustained. Such a method of splitting up damages resulting from a single transaction, and thus multiplying suits, is contrary to all legal policy."

In New Brighton *vs.* Peirsol, 107 Pa., 280, in a Per Curiam opinion, it is said:

"If a grade of the street had been legally established and the work actually commenced on the ground, before the purchase by the defendant in error, the dam-

ages should not be so split and divided as to give him a portion thereof. He would take the property cum onere."

"It is true, that in a proceeding to recover damages caused by the opening and grading of a street, the party must submit his whole claim, embracing consequential as well as direct injuries." Jones *vs.* Bangor Borough, 114 Pa., 638.

The owner of a property abutting on a street which is graded by the borough, while bound to lay a pavement as directed by the borough, is not required to grade the sidewalk; is not required to either cut or fill extensively.

In Judge McPherson's opinion, Steelton Borough *vs.* Booser, 162 Pa., 630, which was affirmed by the Supreme Court and has been frequently cited and followed, we find this language:

"It was suggested at the trial that the borough was not bound to grade the street between the building lines; that its legal duty was done when the driveway was graded between the lines of the curbs, and that the abutting owners might thereafter be compelled to grade at their own expense as well as to pave the space intended for the sidewalk. To state this proposition is to answer it, as it seems to us. When a borough exercises its discretion and decides to grade a street, the work is necessarily an entirety and the whole of it is to be paid for according to the same rule. It need not all be done at the same time. If it seems wise to cut down or fill up the driveway only, postponing the grading of the sidewalks until the abutting lot come into the market, there can be no objection to this action; but it would certainly be unjust and unequal to grade the public driveway at the public expense, and then compel each abutting owner to grade the public footway at his own expense. . . . If a borough has done its full duty when it has provided a sufficient roadway for vehicles, and if it may then call upon the abutting owners to provide a sufficient sidewalk for pedestrians, it is manifest that much inconvenience and injustice will arise. . . . Moreover—to use a striking illustration put by defendants' counsel—wherever a fill like that now in proof becomes necessary the borough will be compelled to build a wall at the curb line to hold up the roadway, and the lot owner will be compelled to

build a second wall ten feet distant at the building line to hold up the sidewalk. A theory which leads to such unnecessary expense is put upon the defensive, and needs the support of convincing argument before it can hope for acceptance."

The action of the council in establishing the grade of the street without differentiating between the sidewalk and the cartway in any way in my opinion established the grade for the entire street between property lines.

In Freemansburg *vs.* Rogers, 6 Sadler, 1, Judge Reeder in charging the jury said:

"There is no contention that that grade so left by the borough in 1858 was ever fixed by any subsequent ordinance or resolution by the borough until 1870, when it adopted this official map which is in evidence, and which fixed the grade of that street. When that map was adopted fixing the grade of Main Street in front of that property, that fixed the grade of both the pavement and the street."

That portion of the charge was assigned as error in the Supreme Court, but the judgment was affirmed in a per Curiam opinion.

"Borough authorities alone have power to change the grades of streets and alleys, and an ordinance authorizing a raising of the tracks of a railroad company, which necessarily involves changes in grades of streets, must be construed as an ordinance of a borough providing for changes in the grades of its highways crossed by the railroad." Lewis *vs.* Homestead, 194 Pa., 199. Chester City *vs.* Lane, 24 Pa., Sup. Ct., 359.

In Righter *vs.* Philadelphia, 161 Pa., 73, it is held that where the opening and grading of a street are both done at the same time, the damages must be assessed in one action, although the remedies are under different acts of assembly and the proceedings in different courts.

In McGar *vs.* Bristol, 71 Conn., 652, in an opinion by Mr. Justice Baldwin, this statement is made:

"The damages recoverable for a change of grade in the highway include such as may result from any change in that of the sidewalks. That is, when constructed on the highway, from a part of it, and it is within the discretion of the municipal authorities whether they shall or shall not be maintained on a level with the roadbed

traveled by vehicles. To change their grade is to change in part that of the highway, although in other respects it may be left unaltered."

In Dawson *vs.* Pittsburgh, 159 Pa., 317, it is held that where the grading the street leaves the owner's property in a depression, the jury could consider what it would cost to make the fill, as an element of damage.

And in Mellor *vs.* Philadelphia, 160 Pa., 614, it is held that the owner of property injured by change of grade is entitled to damages although his property did not abut on the street graded.

The borough had the right to adopt ordinances general in character or make specific provisions.

"The grading here referred to is only such as is incidental to the sidewalk, as distinguished from the general grade of the street. Under the terms of this enactment the city would, undoubtedly, have the power to ordain a reasonable regulation as to the height of the the sidewalk above, or its depth below, the grade of the street, or that footways should slope towards the street, or that they should have foundations of a certain character and be constructed in a certain manner. . . . It was held by Judge McPherson, in an opinion which was adopted by the Supreme Court, that when a borough exercises its discretion and decides to grade a street, the work is necessarily an entirety and the whole of it has to be paid for according to the same rule. That it would be unjust and unequal to grade the public driveway at the public expense, and then compel each abutting owner to grade the public footway at his own expense." Philadelphia *vs.* Weaver, 14 Pa., Sup. Ct., 293; Black *vs.* Roebuck, 17 Id., 324.

Another controlling principle leads to the same conclusion. The right of action begins as soon as the borough has commenced its work on the ground and from that time the statute of limitation begins to run.

O'Brien *vs.* Railroad Company, 119 Pa., 184.
Volkmar St. Philadelphia, 124 Pa., 320.
Whitaker *vs.* Phoenixville Boro., 141 Pa., 327.
Plan 166, 143 Pa., 414.
Ogden *vs.* Philadelphia, Id., 430.
Righter *vs.* Philadelphia, 161 Pa., 73.
McCurdy *vs.* Linesville Boro., 10 Pa. D. R., 546.

Nyhart *vs.* Taylor Boro., 31 Pa. Sup. Ct., 635.

In the last case Mr. Justice Porter uses this language:

"The right of the plaintiff to recover damages for the injury to his property resulting as a natural and necessary consequence of the grading of Main Street arose as soon as the work was commenced upon that street in front of his property." And the statute of limitation would begin to run from that time.

Landes *vs.* Borough of Norristown, 21 W. N. C., 212.

Therefore, as the ordinance and resolution of the town council were in general terms without making a distinction in the grade between the cartway and the sidewalk, the plaintiff was at liberty to commence proceedings as soon as the borough commenced its work, and had the right to assume at that time that the entire street between property lines would be graded.

In Somerset Borough the rule has been on all work done that the borough pays for the paving of one-third of the width of the driveway, and the property owners on either side for the other two-thirds.

That Dr. Shaulis, the vendee, is not entitled to any damages by reason of the work done in pursuance of the ordinance and resolution in evidence, is shown by New Brighton *vs.* Peirsol, 107 Pa., 280.

The conclusion I have arrived at therefore may be summed up as follows:

1. All damage accuring from the grading which has been done and that contemplated by the ordinance are to be recovered in this action; and therefore, when the sidewalk is lowered to the grade of the cartway by the borough, no further claim can be maintained against the borough.

2. The borough has the right to lower the sidewalk in front of plaintiff's property at any time it sees fit, without any further action by its council, or without any further liability for damages.

3. The owner of the property has the right to require the borough to lower the sidewalk to the grade or level of the cartway at any time he desires.

The motion for new trial is overruled, and judgment is directed to be entered on the verdict in favor of the plaintiff upon payment of the jury fee.

LOUCKS' ASSIGNED ESTATE.

Distribution—Joint Makers—Subrogation.

Claimants, together with the assignor and S, were the makers of a joint note in favor of B, which note was due and unpaid at the time of the assignment. Subsequently S paid his one-fifth of the note, and claimants paid the other four-fifths. At the distribution, claimants were allowed a dividend on the whole of the note. Held, that exceptions to such allowance must be dismissed.

By the payment of the note they stepped into B's shoes and were thereby subrogated to his rights and remedies as payee.

Common Pleas of York County. Exceptions to Auditor's Report.

Stewart & Gerber for exceptions.
Allen C. Wiest, contra.

October 20th, 1913. Wanner, P. J.—The controlling legal question raised by these exceptions is whether or not three of five joint makers of a note, who on demand made by the payee have paid the share of another joint maker, are entitled in the distribution of his assigned estate, to be subrogated to the rights of the payee in the note, and to receive a dividend on the whole of said note on account of the moneys so advanced by them.

The material facts of the case affecting this question are briefly as follows:

On the day of the assignment of Edwin W. Loucks, for the benefit of creditors, the First National Bank of York, Pa., was the holder of an overdue and unpaid note, against Edwin W. Loucks, George W. Fry, Niles H. Shearer, Michael Smyser and Samuel Fulton for $36,-052.03, which was dated May 2, 1910, and was payable on demand to said bank.

Each of these five joint makers of said note had also deposited ninety- six shares of the capital stock of said bank with a trustee, as collateral security for the payment of said indebtedness.

On or about August 30, 1912, (and subsequence to said assignment bv Edwin W. Loucks,) Niles H. Shearer paid his one-fifth of the whole indebtedness on said note, and took up his ninety-six shares of said collateral bank stock.

At or about the same time Samuel Fulton, George W. Fry and Michael Smyser, on demand by said bank

paid the other four-fifths of the amount due on said note with interest to wit, the sum of $28,841.66 and took up the other four-fifths of the stock pledged as collateral to secure the payment of said note.

At the same time they received the note itself from the First National Bank marked "Paid August 30, 1912." Edwin W. Loucks paid nothing on account of said note.

Samuel Fulton subsequently died testate, and his widow, Lizzie B. Fulton is now his executrix.

Before the auditor distributing the assigned estate of Edwin W. Loucks, the three joint makers above named who, at his request, had paid his one-fifth of the amount due on said note, to wit: $7210.40, claimed a dividend on the whole of said note on account of their advances.

It was conceded that they could only recover the amount advanced for Loucks less the value of the Loucks collateral, viz: ninety-six shares of First National Bank stock which was worth $95.00 per share when received by them.*

The claim was allowed by the auditor who awarded to them the sum of $3321.00 on account of the same.

The Security, Title & Trust Company, a creditor of Edwin W. Loucks, excepts to this award on the ground: (1) That the joint makers of said note who paid off Loucks', share thereof, were ont entitled to be subrogated to the rights and remedies of the payee against said Loucks, because they were co-debtors, and each being liable to the bank as principal for the whole indebtedness, they were not merely sureties for each other. (2) That if entitled to subrogation, they could only claim a dividend upon the amount actually paid by them for Edwin W. Loucks.

The First National Bank had signed the trust agreement between Loucks and his accepting creditors, in pursuance of his assignment, but the makers of this note have not done so.

In fact, at the time of the execution of that agreement, they had not yet become creditors of Loucks by payment of his share of this note. Their right to participate in this distribution, therefore, rested entirely upon the question whether or not, by payment of the note, they had stepped into the shoes of the bank and had

thereby been subrogated to all of its rights and remedies as payee, for enforcing payment of Loucks' indebtedness thereon.

The auditor ruled upon the authority of Ackerman's Appeal, 106 Pa. 1, and other cases cited in his report, that though the three joint makers who had paid Loucks' portion of the note, were joint debtors with him and each liable to the bank, for the whole amount due thereon, that they must also be considered as sureties for each other, and that they were therefore entitled to subrogation to the rights of the payee as against Loucks. They were, therefore, entitled just as the bank would have been entitled in the distribution of this estate to a dividend, or to successive dividends, on the whole amount due on said note, until the entire sum advanced by them for Loucks (less the value of the collateral received by them) had been recovered.

Such seems to be the rule laid down in that case, and in Miller's Appeal, 35 Pa. 481, which cases have never been qualified or overruled.

Certain dicta of the courts in Mehaffy *vs.* Shure, 2 P. & W. 361; McCormick *vs.* Ervin, 35 Pa. 111, and others of the older cases, to the effect that subrogation would not be allowed to one who was merely a joint debtor as against his co-debtor, were referred to in Ackerman's Appeal. But the Court disregarded them and re-affirmed the broad doctrine laid down in Cottrell's Appeal, 23 Pa. 294, that "subrogation is founded on principles of equity and benevolence and may be decreed when no contract or privity of any kind exists between the parties. Wherever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditor possesses against the debtor." In such cases the debt is not extinguished in equity, when paid by one entitled to subrogation, since payment is essential to subrogation or substitution; Cottrell's Appeal, 23 Pa. 294; Wright *vs.* Sewing Machine Co., 82 Pa. 80.

In an exhaustive note on this subject appended to the case of Sands, Admr., *vs.* Durham, 54 L. R. A. 624; Ackerman's Appeal is cited together with Fessler *vs.* Hickernell, 82 Pa. 150, as showing the rule in Pennsylvania to be, that subrogation will be allowed between joint debtors because though they are both principals as

to their creditor, each is to be treated as a surety for the share payable by the other.

It is also there pointed out, that the Pennsylvania cases do not now bear out the proposition formerly laid down in Bispham's Equity, that the right to subrogation does not exist between partners or between parties who are equally bound as principal debtors to their common debtor.

Hoges' Assigned Estate, 188 Pa. 527, cited by both sides, seems to be in accord with Ackerman's Appeal, supra.

Dowlin and Hoges were two of six joint and several makers of two judgment notes, payable to Buchanan and to Grimes respectively. In the distribution of Dowlin's assigned estate the balance due on said notes was paid in full. In the subsequent distribution of the assigned estate of Hoges, the creditors of Dowlin asked to be subrogated to the rights of Buchanan and Grimes, as against Hoges, and to be awarded one-half of the whole amount so paid out of Dowlin's estate on said notes.

The Court held that they had no superior equity to that of the individual creditors of Hoges entitling them to demand repayment of half of the money paid out of Dowlin's estate for the benefit of the other joint makers, and awarded them only one-sixth thereof, which was the amount paid in relief of Hoges' own share of the indebtedness on said notes.

In this case the excepting creditor has shown no such superior equity as would defeat the claimant's right to subrogation nor will it be prejudiced by the fact that the sum due from Loucks on this note will be paid to these claimants instead of to the Bank. The status of the various creditors and the extent to which they are entitled to participate in this distribution was fixed at the date of the assignment, and the proportion of the Loucks estate then conveyed in trust for the exceptant's benefit, will not be lessened by the substitution of these claimants for the Bank, as payees of the Loucks indebtedness on said note; Miller's Appeal, 35 Pa. 481; Jamison's Est. 162 Pa. 143.

It appears, however, from an exception filed by claimants, that an error was inadvertently made in the calculation of the award to the claimants, Fry, Smyser

and Fulton's Executrix, which should have been $3599.18 instead of $3321.00. But this will not require the recommitment of the auditor's report, because the error can be corrected in the distribution of the balance on the trustee's next account, as this award does not pay said claim in full.

All the exceptions are dismissed except the one showing an error in the calculation of the dividend awarded to George W. Fry, Michael Swyser and Lizzie B. Fulton, Executrix of Samuel Fulton, deceased, which is sustained, and the amount of which award is now increased from $3321.00 to $3599.18.

*This stock was also pledged for the payment of two other notes, aggregating $33,775.00, given by the same makers, to other banks. After using so much of the stock as was necessary to pay Loucks' share of the other notes, there was only $2345 left applicable to the note on which a dividend was claimed.

FINK *vs.* MIKE.

Justice of the Peace—Rule to Show Cause—Petition for Allowance of Appeal Nunc pro Tunc, no Appeal in Twenty Days Having Been Taken or Asked For—Mandamus.

Upon a judgment obtained before a justice of the peace by plaintiff against A., an attachment execution was issued and served upon defendant as garnishee. Upon garnishee's answers to the interrogatories the justice gave judgment in favor of plaintiff, the attaching creditor, and against garnishee on 8 January, 1913. No appeal was taken within twenty days after the entry of this judgment. At the instance of garnishee, on the 3rd of February, 1913, a rule was granted to show why an appeal should not be allowed nunc pro tunc, or why a mandamus should not issue to the justice to compel the granting of an appeal. It is not alleged that an appeal was asked for, or that any affidavit for an appeal was ever made, or that an appeal bond was ever tendered.

Held, that the Court has no power to allow an appeal from the judgment of a justice. If appellant had complied with all the steps essential to the taking of an appeal, and the justice refused to grant it, mandamus would lie. Although garnishee claims to not have understood that judgment was being entered against her, or that it was necessary for her to appeal within twenty days, this would be no ground for allowing an appeal nunc pro tunc. Rule discharged at defendant's cost.

In the Court of Common Pleas of Westmoreland County, No. 15 May Term, 1913. Rule to show cause why an appeal should not be allowed nunc pro tunc, or why a

mandamus should not issue to the justice to compel the granting of an appeal.

B. R. Kline, for Rule.
No appearance for Respondent.

McConnell, J. From the petition and answers, it appears that, on November 16, 1912, Samuel Fink brought suit against one C. A. Wilcox, before J. B. Hagerman, a justice of the peace, in and for Westmoreland county, at New Kensington, and the case was so proceeded in that judgment was, on the 21st of November, 1912, entered against the aforesaid C. A. Wilcox, for the sum of $43.64. On the same day, an execution was issued, and a return of "No goods" was made thereto. Afterwards, to wit: on the first day of January, 1913, an attachment execution was issued from said judgment, and served on Sarah Mike as Garnishee. On the 8th day of January, 1913, she made answer to the interrogatories served on her, in which she stated that she "had a contract with C. A. Wilcox to repair her house. Contract price was $440. That she had paid C. A. Wilcox $100.00; the painter $26; the plumber $2.64; permit $1.00. Balance unpaid, lumber $167.45; plumber $2.00; brick unpaid $7.00." If all that she had paid to Wilcox and others—and all that she sets out as being yet due to others for materials, etc., be added together, they would aggregate $134.19 less than what she was to pay Wilcox for the work. The justice, on this answer, gave judgment in favor of the attaching-creditor, and against the garnishee, for $65.64. This judgment was entered on the same day that the answers were filed, viz: 8th January, 1913. No appeal was taken within twenty days after the entry of this judgment. It is not alleged that one was asked for—or that any affidavit for an appeal was ever made—or that any appeal-bond was ever tendered—or anything else done that is essential to the perfecting of an appeal according to law. The pending rule was granted on the 3d day of February, 1913.

It is of double aspect—the attaching-creditor and the justice before whom the proceedings were conducted being both made respondents. The petitioner seeks to have an appeal allowed, nunc pro tunc, or to have a mandamus against the justice requiring him to grant an

appeal. We are sometimes petitioned for leave to have an appeal filed nunc pro tunc, but not so frequently to allow an appeal, nunc pro tunc. The petitioner has no transcript of appeal, and never asked for one. We have no power to allow an appeal from the judgment of a justice. That is a thing that the justice grants when certain necessary steps have first been taken by the party seeking the appeal. It is grantable within twenty days after judgment. If it had been made to appear that, notwithstanding appellant's having complied with all the steps essential to the taking of an appeal, and notwithstanding her request to the justice, within twenty days after entry of judgment, for the allowance of an appeal—the justice had refused to grant an appeal, we would then have a case presented of official misconduct on the part of the justice, which could be reached by writ of mandamus issued out of this court—but these things are not alleged in this case. The petitioner therefore, now comes before the Court, without any transcript of appeal that we could direct to be filed nunc pro tunc, and without a showing of any neglect or refusal of the justice to grant one, under circumstances which entitled her to an appeal—such as might be reached by this Court, through the instrumentality of a writ of mandamus.

In order that we may, through a writ of mandamus, deal with a justice of the peace and thereby command him to grant an appeal, we must be first informed that he has been guilty of official dereliction in not granting an appeal, and, in order to show that, it is essential for a petitioner to show that he himself has complied with all conditions precedent to the right to appeal—a thing this petitioner has not attempted to do. She has not even asked the justice to grant an appeal. There is nothing in any averment of the petitioner to assail the correctness of the following averment in the answer of the justice: "And it is averred that the said garnishee, her attorney, or any one acting for her, never came to the office of the said John B. Hagerman, justice of the peace, and requested an appeal within the time allowed by law for taking of appeals. That no affidavit of appeal was made, nor bond for appeal given, as required by law, and it is further averred that said John B. Hagerman, justice of the peace, did not, in any way, attempt to hinder said garni-

shee from appealing, but, on the contrary, always stood ready and willing to comply with the requirements of law." The affirmative of the things thus negatively stated in the averment of the answer, would have to be made to appear, in order that we might know that the justice had acted in a way violative of his official duty, but nothing, in an affirmative form, appears in the petition of the garnishee; therefore, the averment of the answer is uncombatted in the case, and its declaration accords with the presumption of law. Accepting its truthfulness, as, under the circumstances, we must do, no violation of official duty on the part of the justice appears, with respect to the granting of an appeal. There is, therefore, no case for a writ of mandamus to the justice requiring him to grant an appeal, inasmuch as mandamus only lies where there has been shown neglect or refusal to perform official duty.

The substance of the defense which the petitioner now seeks to interpose to the attachment is to the effect that Wilcox has not fully performed his contract, and until he does, there would be no money coming to him that would be attachable. She claims to have stated this defense, at the time she answered the interrogatories, but that the justice made no record of it. This statement is met with an emphatic denial by the justice, and the presumption of law would accord with the justice's statement. The petition avers that her answer was, in a number of particulars, materially different from what the paper identified by her mark shows it to have actually been. She claims to not have understood that judgment was being entered against her—or that it was necessary for her to appeal within twenty days. This would be no ground for allowing an appeal nunc pro tunc. Uhler *vs.* Kitcherra, 1 W. N. 3; Hipperd *vs.* Van Horn, 2 W. N. 67. These professions of ignorance are, however, denied by the answer of the justice. Among other things, he says: "It is averred that your deponent, John B. Hagerman, justice of the peace, met Salin Nemy, a son of Sarah Mike, the garnishee, and who was acting for her, and in her behalf, at the office of Geo. D. Hamor, Esq., in New Kensington, Pa., on or about Jan. 9, 1913, and informed him of the judgment against Sarah Mike, garnishee, and that she could take an appeal within twenty days. That

Geo. D. Hamor, Esq., then advised the son of garnishee, there was nothing else to do but to take an appeal, or pay the amount of the judgment." The answer of the plaintiff tends to corroborate that of the justice in all material points. The answer of the justice is very full and specific —meeting all things that are set out in the petition, including those that are insinuated in the petition, rather than plainly averred therein.

In the first paragraph of her petition, she represents "that she is the innocent defendant in a suit wherein judgment has been obtained against her by mistake or design, without giving her to understand her danger." In another paragraph, she says "Your petitioner has been deceived and mislead, and will have to pay more money than is justly due, in fact will have to pay money no part of which is due, unless an appeal be allowed her." Who, and by what specific means, has misled petitioner, is not stated. If a justice deceives and misleads one who desires to appeal, to the latter's injury, the courts are disposed to assist an appellant, within proper limitations, but mere insinuations of deceit, contained in vague and general terms, when those insinuations are themselves confronted by direct and specific denial, afford no adequate basis for action by the Court. Nothing appears in this case that would authorize the Court to decree that "an appeal be allowed, nunc pro tunc, as if it had been taken before January 28th, and that J. B. Hagerman, Justice of the Peace, be directed to prepare and give her such appeal, and that she be permitted to file the same nunc pro tunc; or that a rule be granted on Samuel Fink, Plaintiff, and on J. B. Hagerman, J. P., to show cause why the appeal shall not be filed, nunc pro tunc,"—and yet that is the specific thing that we are asked to do in this case.

The rule is discharged at defendant's cost.

SELLERS *vs.* MYERS.

Wills—Construction—Life Estate—Fee, with Power of Consumption—Act of April 8, 1833, P. L. 249.

A testatrix in her will provided: "I make and bequeath unto my husband Matthew S. Wolfe all my personal property and real estate," and added: "After the death of my husband, Matthew S. Wolfe, if there be any real estate left or personal property left, I want the one-half to go to my parents, if living, if not living, to go to my nieces and nephews." She was survived by nephews and nieces, and her husband woh at his death devised all his property to his sister.

Held, That the husband's sister took under his will a half interest in the real estate devised to him by the testatrix, but he could not so dispose of the other half, which passed under the will of the testatrix to her nephews and nieces.

A will must be so construed as to avoid partial intestacy unless the contrary is unavoidable.

Case Stated. C. P. of Lancaster County. May Term, 1913, No. 36.

Melvin P. Miller and John E. Snyder, for Plaintiff.
F. Lyman Windolph, for Defendant.

September 20, 1913. Opinion by Landis, P. J.

Under the terms of the Case Stated it appears that Mary E. Wolfe, being possessed of a house and lot of ground located in the Borough of Columbia, in this county, died on December 22, 1909. She left a will, the material part of which reads as follows: "I make and bequeath unto my husband, Matthew S. Wolfe, all my personal property, and real estate, except the following-named articles, ½ dozen of silver spoons, a pear of butter nifess, bedding, teaset of dishes, jewelry and clothing, and some fancy work of mine to my niese May Bucher doter of my brother Joseph Bucher. After the death of my husband Matthew S. Wolfe if there be eney real estate left or nersonal property left, I want the won halfe to go to my perense if living, if not living to go to my nices and nephews." The parents of Mrs. Wolfe died before her, and her husband, Matthew S. Wolfe, died on April 8, 1913. The real estate above mentioned was at that time unconverted and was unencumbered. Mary E. Wolfe left surviving her a brother, Joseph Bucher, and a sister, Alice Williams. She also left six nephews, one of whom is a son of Alice Williams, and the other five are the sons of Joseph Bucher. She also left a niece, Mary

Bucher Heiland, a daughter of Joseph Bucher. All of these are now living. Matthew S. Wolfe left a will, in which he devised and bequeathed all his property, real and personal, to his sister, Mary C. Sellers. She now claims thereunder the above-mentioned real estate, and has entered into a written agreement with John H. Myers, the defendant, for its sale, for the sum of $1,000. Myers, however, has refused to take the same and pay the purchase money, for the reason that he claims that Mary C. Sellers has not a fee simple title in the property. It is agreed that, if we find that Mary C. Sellers is seized in fee simple of the said house and lot, then judgment shall be entered in her favor and against the defendant for the sum of $1,000; or, if we are of opinion that she is seized of the one-half of the same, then judgment shall be entered in her favor and against the defendant for the sum of $500.00; but, if we are of opinion that she has no interest in the said house and lot, then judgment shall be entered in favor of the defendant.

We are of the opinion that the question as to whether or not the plaintiff has an entire fee simple title in this land is conclusively ruled by the recent case of Fassitt *vs.* Seip, 240 Pa., 406. There the testator provided that "all the residue and remainder of my estate, real and personal and mixed, . . . not otherwise herein, or hereby disposed of, I give, devise and bequeath unto my said wife to have, use and enjoy the same, in like manner as I myself could do if living." In the next clause, he provided that "whatever of my said estate, that may remain unexpended after the decease of my said wife, I direct to be divided into two equal parts or shares." One share he gave to his son for life, and after his death to his children, and the other share to his daughter. It was held that the gift to the wife was a life estate only, with power to consume, and that she could not, by will, dispose of any estate derived under her husband's will remaining at his death. Mr. Justice Elkin, in discussing the proposition, said: "Prior to the Act of April 8, 1833, P. L. 249, a devise did not carry a fee unless it contained words of inheritance or other words showing an intention that a fee should pass. The Act of 1833 changed the rule of construction by providing that the whole estate of the testator devised should pass even if the devise did

not contain words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation, or otherwise, 'that the testator intended to devise a less estate.' In the present case there are no words of inheritance or of perpetuity, and if it were not for the Act of 1833, no one would seriously contend that the wife took an absolute estate. It remains to be determined whether by reason of the Act of 1833, she took a fee simple title. It is expressly provided in this Act that, where the intention of the testator to devise a less estate clearly appears, such intention must prevail as against the statutory rule that the whole estate passes, although there be no words of inheritance or of perpetuity. A devise over and words of limitation are evidence of an intention not to devise the whole estate, and the intention to devise a less estate may 'otherwise' appear. It is so provided in the act itself. In the will under consideration there is a devise over and there are other provisions clearly indicating that the testator had in contemplation an 'unexpended' balance of his estate at the death of his wife. He directed to whom this unexpended balance should go and how it should be enjoyed. He intended that his wife should have every use and enjoyment of his residuary estate that he himself had while living. If necessary for her comfort and maintenance, she could have consumed and expended all of it, and for these purposes could have conveyed a fee simple title to a bona fide purchaser. But this she did not do. She died in possession of the properties and undertook to dispose of them by her will. We, therefore, agree with the conclusion reached by the learned Court below that the properties in question are a part of the unexpended remainder of the estate of her husband and passed under his will to the devisees named therein. Not having consumed the residuary estate of her husband in her lifetime, the wife could not dispose of it by will. These conclusions find ample support in the following cases: Henninger *vs.* Henninger, 202 Pa., 207; Kennedy *vs.* Pittsburgh, etc., R. R. Co., 216 Pa., 575; Allen *vs.* Hirlinger, 219 Pa., 56; Briggs *vs.* Caldwell, 236 Pa., 369." Again, in Dickinson's Estate, 209 Pa., 59, it was held that "a devise of an estate with power to convert and consume, but with a gift over of an unconsumed part on the death of the first taker, carries with it only

the power of actual consumption in good faith." There a wife devised and bequeathed the whole residue of her estate to her husband absolutely, and followed the absolute gift with these words: "Should my husband not expend the whole of my estate, then it is my desire, at his death, to give so much of it as remains to my sister and my two brothers." It was held that the administratrix of the wife, after the death of the husband, was entitled to the estate not consumed by the husband, and that it was immaterial that two judgments which were part of the wife's estate had been assigned and transferred by the husband as his wife's executor to himself individually. See, also, Montgomery Estate, 20 Dist. Rep., 564.

Following these cases, it would appear that the half of this real estate is, by the devise over of the real estate left, vested in the nieces and nephews of Mary E. Wolfe, the original owner. If this be so, the plaintiff could not convey the whole of the property in fee to the defendant, and she, under the terms of the Case Stated, is not entitled to recover the full amount of the purchase money stipulated for in the agreement.

The next question is, whether the other half passed to Matthew S. Wolfe in fee under his wife's will. As has been stated by Mr. Justice Elkin, in Fassitt *vs.* Seip, supra, under the ninth section of the Act of April 8, 1833, P. L. 250, all devises of real estate pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over or by words of limitation or otherwise in the will that the testator intended to devise a less estate. In this case, there are no words of limitation, nor is there any devise over, except as to the one-half of the real estate left in favor of the testatrix's nieces and nephews. In Snyder *vs.* Baer, 144 Pa., 278, a testator devised certain real estate to his wife, "to have the sole control of the same during her lifetime, and at discretion she shall order my executor to sell the real estate . . . and the moneys realized . . . my executor shall pay over to my beloved wife, Anna, and she . . . shall have power to dispose of the same by bequeath, or as she directs." Mr. Justice Paxson, in delivering the opinion of the Court, said: "We have here a childless testator who gives the

sole interest in the land to his wife. We think the case comes within the ninth section of the Act of April 8, 1833, which declares: 'All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appears by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate. The will of Michael Shaffer contains no devise over, nor do we find any express limitation of the estate to his wife for life only. I have not discussed the authorities. It is sufficient to refer to Morris *vs.* Phaler, 1 W., 389; Musselman's Est., 39 Pa., 469; Second Ref. Church *vs.* Disbrow, 52 Pa., 219; Grove's Est., 58 Pa., 429." See, also, Feuerstein *vs.* Bertels, 221 Pa., 425. Many other cases of like import might be cited.

We, therefore, conclude that Matthew S. Wolfe took an estate in fee under the Act of Assembly in the one-half of his wife's real estate. If this construction is incorrect, there would be an intestacy as to this half, and, as was held in Boies Estate, 177 Pa., 190, "a will must be so construed as to avoid partial intestacy, unless the contrary is unavoidable." We are of the opinion that, under the terms of the Case Stated, judgment should be entered in favor of the plaintiff and against the defendant for the sum of $500.00.

Judgment for plaintiff.

SIVIN BROS. *vs.* FANNIE GOODMAN, TRADING AS THE EMPIRE DRYGOODS CO.

Evidence—Husband and Wife—Act of May 23rd, 1887, P. L. 159.

In an action of assumpsit against a wife doing business under a firm name, an attempt to elicit evidence from her husband to be used against her, the husband not being a party to the record but called by the plaintiff as for cross-examination; is within the prohibition of the Act of May 23, 1887, P. L. 159.

Motion to hold witness in contempt of court. In the Court of Common Pleas of Lackawanna County. No. 780, May Term, 1912.

Welles & Torrey, for Plaintiff.
R. J. Manning and J. O'Brien, for Defendant.

Edwards, P. J., October 8, 1913. It appears from the record before us that Fannie Goodman is doing business under the trade name of the Empire Drygoods Company, and that Henry Goodman is her husband. In the taking of depositions on a rule for a new trial, the plaintiff called the husband to the stand "as if for cross-examination." The attorney for the defendant objected, and instructed the husband not to answer the questions propounded to him. The ground of the objection was twofold: (1), The husband, not being a party to the record, cannot be called as if for cross-examination; and (2), the law prohibits a husband from testifying against his wife. Confronted by the refusal of the husband to testify as to certain matters, plaintiff's counsel has had the record certified to us that we may order the witness to answer the questions before the commissioner, and so that the witness may be held in contempt if he refuses to answer the questions, after being directed to do so by the court.

Under the facts above stated, has the plaintiff the right to call the husband as if for cross-examination? As a matter of first impression, it would seem reasonable to hold that when a business is in the wife's name, and the husband is her agent and the sole manager of the business, the husband could be called to testify, although not a party to the record. By virtue of his position the husband is the only one in possession of the information sought by the adverse party. This impression is strengthened by the dictum found in the chief justice's opinion in the case of Callendar *vs.* Kelly, 190 Pa., 455, a case from our own county. In this opinion the following language is used: "The court rightly refused to permit Mr. Callendar to be called by the defendant as on cross-examination. Apart from the fact that the proposed witness was not a party interested, there was no evidence that he was his wife's agent. In the absence of such evidence, he could not be called to testify against her." However, we consider that the case of Canole *vs.* Allen, 222 Pa. 156, is decisive against the contention of the plaintiff. In the case cited Mr. Justice Stewart says:

"In an action of trespass against a husband and wife, where it is admitted that the actual trespass was committed by the husband, and the husband is called as for cross-examination for the sole purpose of testifying against his wife, it is reversible error for the court to permit him to testify that he was acting as his wife's agent in the commission of the trespass; and the court will take judicial notice of such error whether it was assigned as error or not."

The Act of 1887, P. L. 159, defining the competency of witnesses, provides, not only that husband and wife cannot testify to confidential communications made by one to the other, but that they are not competent and will not be permitted to testify against each other, except in certain proceedings. "The parties to a suit, and the trial judge as well, are bound to take notice of this prohibition. Connivance by the parties cannot avoid it, nor can indulgence by the court."

The objection to plaintiff's contention is fundamental. The attempt to elicit evidence from the husband to be used against the wife is within the letter and spirit of the prohibition contained in the act of assembly.

Now, October 8, 1913, plaintiff's motion is denied and the petition is dismissed.

MERTZ, CHRISTIAN & CO. *vs.* CITY OF READING.

Municipal Liens—Failure to File—Right to Refuse Sewer Connectious—Duress.

Where a city has lost its right to file a lien for sewer connections under the Act of 1901, P. L., 364, it may nevertheless refuse to allow connections with the sewer by owner of property who have not paid the cost assessed. To constitute duress there must be coercion sufficient to render payment involuntary, and the threatened power must be such that the party making the payment has no other immediate or adequate relief.

In the Court of Common Pleas of Berks County. No. 69, March Term, 1911.

Harvey F. Heinly, for Plaintiff.
H. P. Keiser, City Solicitor, for Defendant.

Opinion by Wagner, J., February 24th, 1913:

This suit was brought to recover back $85.58 paid on October 20th, 1910, and $21.42 paid on November 25th, 1910, by plaintiff to defendant, under these circumstances: City Councils, by ordinance, authorized the construction of a house sewer system and in pursuance thereto defendant laid main pipes, together with eight house connections therefrom, extending to the curb line, along premises having a frontage of about 150 feet and located on North Eighth street, Reading, Pa., then owned by Christian Stoltz. At the time of the construction but one house was located thereon. When the bill for these eight connections and for the main sewer was presented to Mr. Stoltz he remonstrated against the payment of seven of these connections for the reason that houses had not yet been erected upon the vacant lot and therefore he would not have any immediate use for them. The clerk in the City Engineer's Office then changed the bill by striking out the figure 8 and substituting the figure 1, and also reducing the bill from $393.45 to $260.69, the difference being the cost of the seven connections. The bill thus changed was then paid. The claim for the seven connections, not paid, was never filed in the prothonotary's office as a lien against the property. By a number of mesne conveyances this property became vested in the plaintiffs on July 20th, 1910. They thereupon commenced to erect upon the vacant lot ten dwelling houses. When they desired to connect with five of these unpaid house connections, to wit: with four on October 20th, 1910, and one on November 25th, 1910, the city refused permission unless the plaintiffs first paid the cost thereof. These respective sums were accordingly paid on these respective dates and accompanying the payment the plaintiffs filed their written protest wherein they asserted the right to connect without payment, but stated that rather than suffer the inconvenience and expense that they would be put to by reason of the refusal to connect before payment, that they made payment under protest until the question, whether they were obligated to pay for the cost of these connections, could be otherwise legally adjudicated, and then to endeavor to recover the same back from the city.

It is clear that under the Act of June 4, 1901, (P. L.

364, sec. 10), this claim, not having been filed against the property within six months after the completion of the improvement, was thereupon wholly lost. That is, the claim was no longer a lien or claim against the property: City of Scranton *vs.* George C. Genet, et al., 232 Pa. St. 272, 274. Also that originally the only action therefor could have been one in rem against the land and the city could not recover in an action of assumpsit: Philadelphia, to use, *vs.* Bradfield, 159 Pa. St. 517. But whilst this claim could not be recovered by the city by an action in rem, by reason of failure to file a lien, or by a personal action, yet we do not consider that the city was obligated to allow the use of these house sewer connections without payment therefor. That is, for the purpose of this case, the only effect of the failure to file the lien within six months after the completion of the work was that the city lost its right of action for the cost thereof, which it otherwise could have had even if the property owner had not used these connections. The connections were the property of the city; had not been paid for and were not indispensable to the use and enjoyment of the houses in course of erection at the time demand was made for their use. The city had not passed any ordinance compelling their use and the purpose for which same were to be used could have been supplied by wells. In the case of Craven *vs.* Harsh, 186 Pa. St. 132, Mr. Justice Mitchell, on page 136 says: "In City of Philadelphia *vs.* Cooke, 30 Pa. 56, it was held that the discharge of a municipal lien for water pipe by a sheriff's sale would not prevent the city from refusing to furnish water to the premises until the claim was paid, as there had been no actual payment of the debt." We therefore consider that the city had the right to refuse to plaintiffs the use of these connections until actual payment for them had been made.

The determination of this case does not, however, solely rest upon whether or not the plaintiffs had the right to make these connections without having first paid for them. One of the essential elements to recover back money upon the ground of having been involuntarily paid is thus stated in Union Insurance Co. *vs.* The City of Allegheny, 101 Pa. St. 250, on page 256: "3. The payment by the plaintiff must have been made upon compulsion to prevent the immediate seizure of his goods or the

arrest of the person and not voluntarily. 'Unless these conditions concur, payment under protest will not give a right of recovery.'" The fact that this payment may have been made under protest does not help the present case. In Lowenstein *vs.* Bache, 41 Pa. Sup. Ct. 552, on page 557, we have: "The only effect of a protest is to show the involuntary character of a payment procured by duress, and the intention to reclaim the money. There must be compulsion, actual, present and potential, inducing the payment by force of conditions which render the person or property subject to the control of the party demanding payment, when the party so paying may give notice of the illegality of the demand, his involuntary payment and intention to reclaim. When the element of coercion is lacking, a mere protest or notice will not change the character of the payment or confer of itself a right to recover, although it may be necessary in some cases, where the element of coercion is present, to pay under protest, that is, with notice of an intention to reclaim, in order to repel the implication of an assent: Peebles *vs.* Pittsburgh, 101 Pa. 304; Borough of Allentown *vs.* Saeger, 20 Pa. 421; McCrickart *vs.* Pittsburg, 68 Pa. 133; Harvey *vs.* Girard National Bank, 119 Pa. 212; De la Cuesta *vs.* Insurance Company, 136 Pa. 62."

The plaintiffs, however, contend that this claim was paid under duress. In Lowenstein *vs.* Bache, supra, on page 558, what constitutes duress or coercion is thus stated: "To constitute the coercion which the law will recognize as sufficient to render a payment involuntary there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting payment, from which the party making the payment has no other means of immediate and adequate relief. The threat of a distress for rent, when there is no rent due, is not such duress, because the party may replevy the goods distrained, and try the question of liability at law. The threat of legal process is not such duress, for the party may plead and make proof, and show that he is not liable. But when there is neither suit nor legal process of any kind, and the goods of a party are unlawfully detained until he pays a sum illegally demanded, he may pay under protest and maintain an action to recover the money.

The general rule may be thus stated: When a party is compelled by duress of his person, deeds, papers, or personal property and the evidence of title thereto, to pay money illegally demanded, from which the party making the payment has no other means of immediate and adequate relief, it is not voluntary but compulsory; and he may rescue himself from such duress by payment of the money under protest, and afterwards on proof of the fact recover it back: Hospital *vs.* Philadelphia County, 24 Pa. 229; White *vs.* Heylman, 34 Pa. 142; Motz *vs.* Mitchell, 91 Pa. 114; Lehigh Coal and Navigation Co. *vs.* Brown, 100 Pa. 338; Union Insurance Co. *vs.* City of Allegheny, 101 Pa. 250; Shaw *vs.* City of Allegheny, 115 Pa. 46; Railroad Co. *vs.* Commissioners, 98 U. S. 541; Harmony *vs.* Bingham, 2 Kernan, 99; Stenton *vs.* Jerome et al., 54 N. Y. 480."

The circumstances attending the payment are thus stated by one of the plaintiffs, Mr. John F. Christman. He testified that he made application to the city engineer for authority to connect; that the city engineer, Mr. Ulrich, said that these connections could not be made without his getting a clearing slip, which he refused to issue until these bills were paid. In answer to the question by plaintiff's counsel: "Did you object to the payment of these bills that were rendered you by the city authorities, by the city engineer's office." He answered, "Yes, sir. I went and handed them my check and also my letters of protest; that is all." (N. of T., pages 18 and 19).

This, together with the inconvenience or expense that the plaintiffs might have been put to by reason of the refusal of the city to allow the connections before payment of the bills, is not such duress or coercion as would constitute them involuntary payments. The case of City of Philadelphia *vs.* Cooke, supra, is very similar to the one under consideration. In that case a lien had been laid for claims for water pipes. This lien was discharged by sheriff's sale and the city failed to collect the claim from the proceeds thereof. The city authorities refused to allow the water connections without payment first having been made. The court there held that such refusal or threat, if such it could be called, did not constitute duress and that the city had a right to impose

terms upon this grant of water privileges and that the payment under those conditions was a voluntary one. Even if we take plaintiff's view of the case, that they had a right to connect, we have here nothing but the denial by defendant of a right. In De la Cuesta *vs.* Insurance Co., supra, we have, on page 82: "It is a duress either of person or goods that constitutes the coercion. It is not pretended there was a duress of person, nor was there anything to show duress of goods. There was nothing but the denial of a right, and a declared intention not to recognize a right is not duress. It is true, the denial of the right placed the plaintiff in a 'dilemma,' to use the expression of Judge Hare in Dawson's case. But if we adopt the principle that whenever a man is placed in a position in which the law is doubtful and he is compelled to choose between two paths, in other words, to decide between conflicting views of the law, he is to be considered as under duress, we shall certainly multiply litigation, even if no other end is accomplished. Under the facts of this case and the law governing them, we consider that the payments made by plaintiffs to defendant were purely voluntary ones for which they cannot therefore recover: Schoenfeld *vs.* City of Bradford, 16 Sup. Ct. 165; Easton Power Co. *vs.* Ry. Supply Co. 22 Sup. Ct. 538, 545; Bobst *vs.* Gring, 32 Sup. Ct. 541; Shenango F. Co. *vs.* Fairfield Twp., 229 Pa. 357. We consider that in directing a verdict for the plaintiffs we erred and that the defendant's request for binding instructions should have been affirmed. Rule for judgment n. o. v. is made absolute.

SNYDER *vs.* ROUGHTON.

Wills—Power in Will to Sell Real Estate.

Where a decedent in her will provides as follows: "I give and bequeath to my beloved husband all the real estate now in my possession, to be his and for his own use as long as he lives, or if he so desires, he can sell same at best price obtainable. If not sold prior to death of my said husband then I direct that my said real estate be sold at public or private sale for the best price that can be obtained, and the proceeds to be equally divided between my children," the husband has an undoubted power to sell the real estate and his grantee takes whatever estate the testator had therein.

Summons in Assumpsit. Case stated. Common Pleas of Northumberland County. No. 234 February Term, 1913. Abe L. Snyder, Esq., *vs.* Joseph Roughton.

Case stated as follows:

Plaintiff, by articles executed bearing date January 15, 1913, in consideration of the sum of $4,000, agreed to convey to Joseph Roughton, the defendant, in fee simple, clear of all encumbrances, certain real property in Coal Township. Under said articles the deed was to be delivered on or before January 25, 1913. On January 25, 1913, plaintiff tendered to defendant a deed bearing date January 24, 1913, duly executed wherein, for a consideration above mentioned, plaintiff conveyed to defendant the said premises. This deed defendant refused to accept and furthermore refused to pay to plaintiff the purchase money, $4,000, alleging that the plaintiff did not hold the title to said premises in fee simple and therefore could not carry out the agreement. Plaintiff claims the premises as a purchaser in fee simple from Samuel Roughton, widower of Matilda Roughton, deceased, by a fee simple deed duly executed and delivered on January 10, 1913, for the premises above described and for the consideration of $4,000. And the said Samuel Roughton claims the premises as devisee under the will of Matilda Roughton, whose widower he is. Matilda Roughton, being seized in her demesne as of fee of and in said premises, died testate. (Will set forth in opinion of the court). If the court be of the opinion that Samuel Roughton, under the last will and testament of his wife, Matilda Roughton, acquired the title or had the power to convey the title in fee simple to the said real estate which the plaintiff agreed to convey to Joseph Roughton, the defendant, in said agreement recited as aforesaid, then judgment is to be entered in favor of the plaintiff for the sum of $4,000, with interest from January 25, 1913, but if not, then judgment to be entered for the defendant, either party reserving the right to sue out a writ of error therein.

Plaintiff appears in person.
A. K. Deibler for the Defendant.
Moser, J., March 24, 1913—In this case the plaintiff

acquired his title from Samuel Roughton, the surviving husband of Matilda Roughton, late of Coal Township, deceased.

In the last will and testament of the said Matilda Roughton, which has been duly probated and remains on file in the office of the register of wills of Northumberland County, it is provided, "I give and bequeath to my beloved husband, Samuel Roughton, all the real estate now in my possession, to be his and for his own use as long as he lives, or if he desires, he can sell same at best price obtainable. If not sold prior to death of my said husband, then I direct that my said real estate be sold at public or private sale for the best price that can be obtained, and the proceeds to be equally divided between my children," naming them.

We are of the opinion that under the foregoing provision of the will of Matilda Roughton her surviving husband, Samuel Roughton, had an undoubted power to sell the said real estate and under authority of the principle laid down by Mr. Justice Stewart in the case of Henninger *vs.* Henninger, reported in 202 Pa. at page 207, the plaintiff here, under the said sale and conveyance by Samuel Roughton, took whatever estate Matilda Roughton, the testator, had at the time of making said will and of which she died seized; this is admitted to be a fee simple estate.

In the case above cited the court said: "There is no repugnance whatever between a devise for a life term, and a super-added power of sale. Both may operate, and when the power is executed, it is, where as in this case it is not otherwise ordered, simply a substitution of one kind of property for another; the estate of those interested remaining the same in the thing substituted."

When Samuel Roughton exercised his power under the will to sell the real estate of the said Matilda Roughton, the title to which is here in question, we think he conveyed a title in fee simple and we therefore direct that judgment be entered in favor of the plaintiff and against the defendant for the sum of Four Thousand ($4,000) Dollars, with interest from January 25, 1913, in accordance with the terms and conditions of the case stated.

HAIN *vs.* BOWMAN.

Wills—Life Estates—Significance of Words "In Trust," "Children" and "Not Leaving Issue."

Testator died, leaving a will, executed in 1894, in which he disposed of a certain farm to his daughter, the plaintiff, as follows: "unto my daughter . . . . during her life in trust and after her decease to her children, their heirs or assigns, if however, she should die not leaving issue then said farm shall go, belong and be possessed by my son . . . . during his life in trust and after his death it shall belong in fee simple to his children, their heirs and assigns."

At the date of the will the daughter was married, and had one child and subsequently had another. Held: that it was manifest from the will that the testator intended to give his daughter an estate for life only, in the real estate devised; that the words "in trust" must be construed to have been used, not in their technical sense, but merely to emphasize that restriction; that the word "children" as used in the will is a word of purchase and not of limitation; that the words "not leaving issue" must be understood to mean "such" issue, as before designated; and that plaintiff took a life estate in the property and not a fee.

Same—Intention of Testator.

The aim in every instance is to ascertain and if possible to give effect to the intention of the testator, that is, "his actual, personal individual intent, not a mere presumptive conventional intent inferred from the use of a set phrase or familiar form of words."

In the Court of Common Pleas of Berks County. No. 474 February Term, 1913. Case stated.

C. H. Ruhl for Plaintiff.
W. E. Sharman and Jos. R. Dickinson for Defendant.

Opinion by Endlich, P. J., October 25, 1913.—The question to be decided in this case is, what estate did Ellen M. Hain take under the will (made in 1894) of her father in a certain farm, devised as follows:

"unto my daughter * * * during her life in trust and after her decease to her children their heirs or assigns, if however she should die not leaving issue then said farm shall go, belong and be possessed by my son * * * during his life in trust and after his death it shall belong in fee simple to his children their heirs and assigns."

This clause immediately follows one in which the testator devises another farm to his son Daniel—

"during his natural life only in trust and after his death to his children their heirs or assigns forever, should he however die not leaving issue, then said farm shall go

to and belong and be possessed by his sister the aforesaid Ellen M. Hain, during her life in trust and after her death to her children. * * *"

And both the above clauses are preceded by a devise of certain realty to the testator's widow—

"during her natural life so long as she remains my widow after her death said * * * premises shall belong and be owned and possessed by my daughter * * * during her life in trust and after her death I hereby give * * * said * * * premises to her children their heirs and assigns forever should she however die without leaving issue then said * * * premises shall go and belong to may son * * * during his natural life in trust and after his death * * * to his children * * * their heirs and assigns forever."

At the date of the will the daughter was married and had one child, and since has had another.

It is altogether manifest that the testator intended to give to his daughter an estate for life only in the realty devised in the first of the above clauses. He says so in so many words. Nor, under the rule requiring every word in a will to be considered: Schott's Est., 78 Pa. 40; Wood *vs.* Schoen, 216 id. 425; Battenfeld *vs.* Kline, 228 id. 91, will it do to disregard the curious phrase "in trust" repeatedly occurring in the provisions quoted after the words restricting the devises to the daughter and the son to their lives. The purpose of the testator in using that phrase would seem to have been thereby to emphasize that restriction—not indeed by the creation of anything like a technical trust in favor of the ulterior beneficiaries, but by the inartistic expression of the thought in his mind that the life-devisees, while, as such, enjoying the properties, were to be but the channels through which the same were to pass from him to their "children." But far beyond anything implied by the phrase just discussed is the significance of the use of the word "children" as designating the remaindermen. In the interpretation of any given will it is true, decisions upon other wills can rarely be controlling: Fox's App., 99 Pa. 382, 386. The aim in every instance is to ascertain and if possible give effect to the intent of the testator, that is, "his actual, personal, individual intent, not a mere presumptive conventional intent inferred from the use of a set phrase or

familiar form of words." Tyson's Est., 191 Pa. 218, 225. Yet precedents are not to be ignored, and words which have acquired, by a long series of adjudications, a settled legal meaning, are in general to be given that meaning: Daley *vs.* Koons, 90 Pa. 246, 248; Hastings *vs.* Engle, 217 id. 419, 421. It is too well established to warrant a citation of authorities that "children" is a word of purchase and not of limitation, consistent only with the devise of a life-estate to the first taker—unless a different effect be given to the word by an unmistakable indication of intention on the part of the testator to use it in another sense. No such intention, however, is to be gathered from the succeeding provision that in case of the daughter's death "not leaving issue" the farm should go to the son, etc. That language introducing an ulterior devise of the land, the rule is applicable that when an express limitation to a particular class of issue, such as "children," is followed by the words "in default of issue," or others kindred thereto, introductory to an ulterior devise, these words refer to the object of that limitation and not to the issue at large: Haldeman *vs.* Haldeman, 40 Pa. 29, 36; Daley *vs.* Koons, supra. p, 249—being understood to mean "such" issue as before designated: Chambers *vs.* Trust Co., 235 id. 610, 617. It is plain, therefore, that this language cannot be invoked to enlarge the strict significance or change the effect of the word "children." There seems to be nothing else in the context or in the relevant surrounding circumstances that could fairly be laid hold of to do so. It is, to be sure, urged that it does not clearly appear and cannot be reasonably supposed to have been intended by the testator that, if at the death of the daughter there should be children of hers, they should take the farm, whilst if there should be no children, but grand-children, the latter should take nothing. Undoubtedly the rule is that a devise to "children" will not ordinarily include grand-children: Hallowell *vs.* Phipps, 2 Whart. 376; Castner's App., 88 Pa. 478; Hunt's Est., 133 id. 260; Steinmetz's Est., 194 id. 611; Campbell's Est., 202 id. 459; Page's Est., 227 id. 288; Walker's Est., 240 id. 1. But, aside from the reflection that a testator has a clear right to make a provision including the one and excluding the other, if he chooses, and that where he does the Court cannot set it aside, the observation of Mr. Chief Justice

Sharswood, in Daley *vs.* Koons, supra, at p. 249, seems to afford a very complete answer to the suggestion here made. There the devise was to a daughter for life and after her death to her children, and in the event of her dying without issue over. After stating that the main argument pressed in support of the contention that "children" should not be understood literally, was that, under such construction, if the life-devisee should have children who should die before her, leaving children, these grand-children would be cut off, he proceeds as follows:

"This the testator evidently did not contemplate. If it were so, there would be considerable force in this contention. But upon the birth of any child of (the life-tenant) the remainder would vest in such child, subject to open and let in other children subsequently born; so that upon the death of such child, the interest and estate being vested, would descend to children, heirs and legal representatives, under the intestate laws."

And so, in Chambers *vs.* Trust Co., 235 Pa. 610, at p. 617, apparently meeting a similar argument concerning a devise to a nephew and to his "children," and in the event of his death without legal issue over, it is said:

"Moreover there is no necessity for giving the word ("children") an enlarged meaning, for here, under the devise as framed, the estate would vest in the children of the nephew as a class immediately upon any of them coming into existence before his death, and there could, therefore, be no possibility of an exclusion of descendants."

Thus, it is conceived, there is no escape from the conclusion that, under her father's will, the interest of Ellen M. Hain in the property involved in this controversy is merely a life-estate, and therefore—

Judgment is entered upon the case stated in favor of defendant and against the plaintiff for the sum of $662.25 and costs.

WIAND *vs.* SNYDER.

Practice—Judgment for Want of Affidavit of Defense—Rule of Plaintiff for Special Statement and Bill of Particulars.

On an appeal from a judgment given by a justice of the peace, defendant entered a plea in obedience to a rule issued by the plaintiff, but before entering his plea defendant issued a rule on the plaintiff to file a special statement and bill of particulars. The plea was then entered. Held, that the filing of the plea, after the issuance of the rule by the defendant for a special statement and bill of particulars and before the filing of the same on the part of the plaintiff, does not relieve the defendant from filing an affidavit of defense after such special statement and bill of particulars is filed by the plaintiff, and judgment for want of an affidavit of defense will not be set aside as prematurely entered.

Assumpsit. Appeal by defendant from judgment of Earl Roush, J. P. Common Pleas of Northumberland County. No. 13 May Term, 1913. Simon D. Wiand *vs.* M. L. Snyder, Esq.

W. J. Sanders for the Plaintiff.
Defendant appears in person.

Cummings, J., June 3, 1913.—This was an appeal by the defendant from the judgment of the justice of the peace. The appeal was filed in the Court of Common Pleas of Northumberland County on February 4th, 1913; On February 4, 1913, the plaintiff issued a rule on the the defendant to plead within fifteen days or judgment; on February 20th, 1913, the defendant issued a rule on plaintiff to file a special statement and bill of particulars within fifteen days or judgment; on February 21st, 1913, the defendant entered his plea; on March 8th, 1913, the plaintiff filed his statement; on March 14th, 1913, the plaintiff's statement was served upon the defendant by the sheriff; on March 27th, 1913, the defendant issued a rule on plaintiff to file a bill of particulars of the plaintiff's demand, under the common counts, within fifteen days or judgment of non suit; on April 10th, 1913, the plaintiff filed a bill of particulars and on April 26th, 1913, the plaintiff took judgment by default against the defendant for want of an affidavit of defense; on May 5th, 1913, the defendant obtained a rule to show cause why the judgment entered in this case should not be set aside, as prematurely entered, which is the question now before us.

It will be seen from the above statement of facts that

before the defendant entered his plea in obedience to the rule issued by the plaintiff he issued a rule on the plaintiff to file a special statement and bill of particulars. After this rule had been issued and before the filing of the special statement and bill of particulars the plea was entered. Surely after the issuance of the rule by the defendant for a special plea and bill of particulars, the filing of a plea by the defendant before the filing of the special statement and bill would not relieve the defendant from the filing of an affidavit of defense as required.

This case is squarely ruled by the case of Horner *vs.* Horner, 145 Pa. 258.

In the opinion of the court, on page 264, Mr. Justice McCollum says: "The third rule makes the pleadings and the procedure on appeals from the judgments of justices of the peace the same as in like cases commenced in court, but dispenses with the filing of a statement of claim, other than the transcript, unless the defendant enters a rule for a more specific statement; and, in such case, on the filing of such statement he 'is required to reply thereto by affidavit, as in other cases.' In this case, therefore, the appellant might have treated the transcript as a narr, and, if she had done so, she could not have been called on for an affidavit of defense. But she elected to require a more specific statement of claim, and when she received notice of the filing of it, she became liable to be proceeded against under the third rule. There is nothing confusing or inconsistent in these rules; they constitute an intelligible system, under which the appellant had an option to treat the transcript as the narr, or compel a more specific statement of claim. As she sought and obtained a more specific statement, it became her duty to file a sworn answer to it within thirty days. Because she did not do this, judgment was entered against her under the rules. These rules are not unreasonable, and the power of the court to make them cannot be doubted.

"We are unable to find any action on the part of the appellee which can be construed into a waiver of her right to require an affidavit of defense. The notice to plead was compulsory, by the terms of the rule under which the appellant proceeded for a more specific statement of claim, and cannot operate as a waiver or estoppel. It may be conceded that the right to an affidavit of defense may

be waived, but a mere notice to plead, when required by the rule under which the appellant asked for a specific statement, is not a waiver."

Now, to wit, June 3rd, 1913, the rule to show cause why the judgment should not be set aside as being prematurely entered is discharged at the cost of the defendant, M. L. Snyder.

THE ALCANIA COMPANY *vs.* AVONMORE LAND AND IMPROVEMENT COMPANY AND OTHERS.

Bill in Equity—Exceptions to Sufficiency of Answers—Equity Rnles 37 and 38—"Knowledge, Information and Relief"—Answers Not Under Oath—Plea—Inconsistent Defenses.

Upon exceptions to the sufficiency of an affidavit of defense on the law side of the court, the inquiry is as to the sufficiency of the facts set up to constitute a defense to the cause of action declared upon. On exceptions to the sufficiency of an answer in equity the inquiry is as to whether the respondent's answer has the completeness of discovery of a full and proper response to the special facts which the complainant has, by his bill, made the essential legal basis for his demand for relief; for the purpose of exceptions, it matters not whether the answer, as a whole, sets up a complete legal defense or not.

Exceptions cannot be made to perform the function of a demurrer to an answer, or put in question whether the answer discloses a good defense or not.

All the facts which complainant has properly made the subject of express statement in the bill, must also be made the subject-matter of express and complete statement in the answer, to avoid the effect of exceptions for insufficiency, when properly filed.

Where the facts are within defendant's knowledge, he must answer positively, and not as to his information and belief; and if not within his knowledge, he must answer as to his information, and not as to his information only without stating his belief. "Information and belief"—there being no knowledge—is not evidence at all; it is pleading merely and puts in issue the facts in dispute.

A substantive defense, not responsive, to the inquiries of the bill, but consisting of new matter exclusively, is not the subject of exceptions, nor are they applicable to an answer not under oath, nor where the oath has been waived.

The rule that if defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might, by plea or demurrer, protect himself from such answer and discovery; that is to say, full answer and discovery is not demandable with respect to the defense sustainable by plea.

Exceptions only lie to an insufficient discovery, or to scandal and impertinence.

Inconsistent defenses cannot stand, when the admission of the truth of one necessarily proves the falsity of the other.

In the Court of Common Pleas of Westmoreland County, sitting in Equity, No. 740. Exceptions to the sufficiency of answers to a bill in equity dismissed.

Arthur O. Fording, James L. Kennedy and W. S. Wible, Attorneys for Complainant.

Morehead & Smith, Gaither & Whitten, McGeary & Marsh, H. H. Fisher and R. D. Laird, Attorneys for Defendants.

McConnell, J. In addition to the defendant expressly named in the above caption, fifty-nine or sixty other persons are also named in the bill as defendants in this case. The Land and Improvement Company has not answered, and no exception filed is, therefore, pertinent to the case against it. The exceptions have relation to the sufficiency of the answers filed in behalf of defendants other than the Land and Improvement Company. The whole basis of the bill is the operation of an agreement designated in the bill as "Ex. A." This agreement is between the Land and Improvement Company of the one part, and W. H. R. Hillard and Oliver Wylie, whose rights thereunder have been transferred to the Alcania Company, the present plaintiff. It is not alleged or pretended that any of the now-answering defendants participated in the making of Exhibit "A," nor even that any of them had received any personal knowledge of the existence of that agreement or its obligations prior to their respectively becoming purchasers of lots from the Land and Improvement Company, which lots, as the bill alleges, had then been subjected to a lien through the terms of Exhibit "A." If the property of the now-answering defendants is subject to this alleged lien, it is only now claimed that the answering defendants had, prior to their purchases of their respective lots, such knowledge pertinent thereto as the previous recording of Exhibit "A," by legal presumption, would afford them. While an accounting from the Land and Improvement Company is sought in this bill, no accounting is sought from the now-answering defendants. The decree sought against them has relation only to the declaring, and the giving efficacy to, the alleged lien on their respective lots. If they were innocent purchasers, no lien exists,

and none can be declared to exist under this bill. It is obvious that much that is contained in the bill has relation only to the case of accounting against the Land Company, wherewith the answering defendants are in no wise concerned. With respect to sales made by the Land Company to persons other than the respective individual purchasers of their own particular lots, it may properly be said that such sales would be transactions of which there would be no presumption of knowledge, except as to the immediate parties to those particular sales.

The first eleven exceptions to the answer of the Peoples Natural Gas Company are to the effect that the answers only deny lack of "knowledge"—and do not speak of the respondent's "remembrance, information and belief," whereas the proper equity practice demands that these omitted things be given expression in the answer, before it can be properly deemed a sufficient answer.

What is meant by "sufficiency," when exceptions are being considered, is an entirely different thing from the sufficiency of an affidavit of defense on the law-side of the court. In the last mentioned connection, the inquiry is as to the sufficiency of the facts set up to constitute a defense to the cause of action declared upon; but on exceptions to the sufficiency of an answer in equity, the inquiry is as to whether the respondent's answer has the completeness of discovery of a full and proper response to the special facts which the complainant has, by his bill, made the essential legal basis for his demand for relief. For the purpose of exceptions, it matters not whether the answer, as a whole, sets up a complete legal defense or not. Exceptions cannot be made to perform the function of a demurrer to an answer, or put in question whether the answer discloses a good defense or not. "By exceptions, plaintiff cannot question the sufficiency of the answer as a defense." 16 Cyc. 316. Every complainant in equity, who sets up in his bill a tenable ground for relief, is, prima facie, entitled to discovery from a defendant with respect to the facts set out in the bill which are essential to complainant's alleged right. If a respondent, (as he may do), confesses and avoids by introducing facts not alluded to in the bill, exceptions cannot properly be predicated on the incompleteness of the terms of the

answer in setting forth such new facts. "A defendant may allege any facts in his answer, as an avoidance, which gives rise to an equity that constitutes a good defense, as payment, a release, etc.; and however generally or darkly such matter may be stated, the plaintiff cannot except, because they form no part of that response he had called for; and if such statements are so obscure as to be of no avail, it can be of no injury to him. The defendant alone bears the consequence of the lame and imperfect answer in which he puts forward his own defense." Per Bland, Chancellor in Salmon *vs.* Claget, 3 Bland, 141. See also Lanurn *vs.* Steel, 10 Humph (Tenn.) 280; Stafford *vs.* Brown, 4 Paige 88; 1 Cyc. Pl. & Pr. 898. Nor can exceptions be properly filed because of failure to answer mere recitals in the bill which are but introductory to, or only incidentally and immaterially related to, the facts which embody the essential ground for equitable relief—as the complainant sufficiently has stated that ground in his bill. All the facts essential to complainant's right and which complainant has properly made the subject of express statement in the bill—must also be made the subject-matter of express and complete statement in the answer, to avoid the effect of exceptions for insufficiency, when properly filed.

Equity Rule 37 requires that "the defendant shall make answer to all the material allegations of the bill." While the respondent is required to make answer to all the material allegations of the bill, yet he is not required to make any discovery therein with respect to anything more than is essential to a legally stated cause of complaint in the bill. The same rule also says: "The rule that if the defendant submits to answer, he shall answer fully to all the matters of the bill shall no longer apply in cases where he might, by plea or demurrer, protect himself from such answer and discovery. And the defendant shall be entitled, in all cases, by answer to insist upon all matters of defense in law, (not being matters of abatement, or to the character of the parties, or matters of form), to the merits of the bill, of which he may be entitled to avail himself by demurrer or plea in bar; and, in such answer, he shall not be compellable to answer any other matters than he would be compellable to answer and discover, upon filing a demurrer or plea in bar and an

answer in support of such plea touching the matters set forth in the bill to avoid or repel the bar, or defence." If the answer comes up to the requirements of that rule, it is not open to the charge of insufficiency. Proper exceptions fix attention, first, on the question of the sufficiency of the statement of the essential facts of the bill, and, second, on the question of whether those facts of the bill have been responsively treated of in the answer, so as to enable a complainant to use the answer as an instrument of evidence in establishing those specified facts of the bill —or to enable the respondent to use it as an instrument of evidence to deny the facts stated in the bill. "Whatever plaintiff is bound to state in his bill, defendant is bound to answer, but a mere recital need not be answered, in the absence of a special interrogatory directed thereto." 16 Cyc, 304; Hardeman *vs.*. Harris, 7 How (U. S.) 726, 12 L. Ed. 389; Van Cortlandt *vs.* Buckman, 6 Paige (N. Y.) 492.

An answer to a bill in equity has, or may have, a double function to perform, viz: as a pleading, and, second, as an instrument of evidence of the nature of a deposition. The discovery that every complainant has a right to have from every respondent is pertinent to the use of the answer for evidentiary purposes. "While an answer is uniformly considered as a mode of defense, it serves not only that purpose, but the further purpose of giving the discovery to which a plaintiff in equity is entitled. The requirements of the latter object have given rise to peculiar rules relating to the sufficiency and effect of answers appropriate to that purpose, but often applied without discrimination to the answer when considered as a defensive pleading." 16 Cyc. 297. After having first spoken about the rules pertinent to the sufficiency of an answer, 16 Cyc. 308, continues as follows: "The foregoing rules are based chiefly on plaintiff's right to discovery. When it comes to pleading defenses, it is said that the same degree of accuracy is not required as in a bill. There must be such certainty as will inform plaintiff of the nature of the defense, and every material fact must be stated, and not left to inference, and stated in a concise and intelligible manner." "The answer of the defendant is not only evidence against him, but it may also, to a certain extent, and if sworn to, be read as evidence in his favor, sufficient, if not outweighed by opposing

proof, to establish the facts it contains. For it is to be observed, that the bill, though, in part, a mere pleading, is not wholly so; but where the older forms are still used, it is the examination of a witness by interrogatories. And in those states in which the interrogating part of the bill is now dispensed with, and the defendant is, by the rules, required to answer each material allegation in the bill as particularly as if specially interrogated thereto, the bill, it is conceived, partakes, in all cases, of the character both of pleading, and also of an examination of the defendant as a witness. The answer too, so far as it sets up a new and distinct matter of defence to defeat the equity of the plaintiff, is a mere pleading in the nature of a confession and avoidance at law; but where it only denies the facts on which the plaintiff's equity is founded, it is not only a pleading, but it is a pleading coupled with evidence. In all other respects, and so far as it is responsive to the bill, it is evidence; and the plaintiff, having thought fit to make the defendant a witness, is bound by what he discloses, unless it is satisfactorily disproved." 3 Greenleaf Ev. sec. 284.

Equity Rule 37, among other things, provides as follows: "The defendant shall make answer to all the material allegations of the bill." Rule 38 provides that specific interrogatories shall not be included in the bill, but may be filed separately, if necessary. They may be filed at any time before the taking of testimony is begun. Interrogatories are but instrumentalities for securing complete discovery in the answer. But, without resorting to them at all, it is the duty of a defendant to make full answers to all material facts averred in the bill as a basis of complainant's equity. He is as much being examined as a witness under a bill in equity, without any interrogatories, as he would have been if there had been interrogatories incorporated therein. "The defendant must answer every material allegation in the bill, whether specially interrogated or not." Eaton's Appeal, 66 Pa. 483. "Special interrogatories were devised only to prevent an evasion of the general duty to answer." 16 Cyc. 303. Therefore, the plaintiff, in securing the testimony of a defendant with respect to the facts set out in the bill, has the same means available to him as he would have were he examining the defendant on the witness stand,

that is to say, he may elicit information by specially interrogating him if he has not voluntarily given it with completeness. In eliciting the testimony through a bill in equity; the interrogatories are put in writing, but their function is the same as if put to the witness orally. They aim at securing discovery.

Now, under Rule 38, specific interrogatories to defendants may be filed "at any time before the taking of testimony is begun." The responses to such special interrogatories are to be taken as but a part of the answer. Therefore, if a complainant conceives that his bill has not been completely answered, he may coerce the defendant to complete responsiveness through the instrumentality of interrogatories. No attempt of that kind has been made by the complainant in this case. Passing by this means of effecting full responsiveness in the answer, the complainant invokes the coercive power of the court to compel it, as it has been provided for in Rule 42 —which means is made available to him only for the space of twenty days after the service of a copy of the answer. The plaintiff in this case did not make application to the court within the prescribed period—but was by the court permitted to do so later. At the time this permission was given, the means of securing responsiveness through special interrogatories, as provided for in Rule 38, was, and still is, available to the complainant. We have concluded, however, to pass by the inadequately explained neglect of the complainant to file his exceptions within the prescribed time, and to now treat them as if filed in time.

As before stated, the first eleven exceptions alleged insufficiency of discovery in the answer. This insufficiency consists not so much in any asserted lack of completeness of description of any facts within defendant's knowledge and not within the plaintiff's knowledge, for the bill makes no allegation of such special knowledge in the respondent, and, from an examination of its contents, it appears that those facts, (in so far as defendants are concerned), are res inter alios acta; and, as to them, the defendant has answered that it has no knowledge. The lack of fullness of description is, therefore, not with respect to the alleged facts, but rather with respect to the fullness of description of the state of defendant's mind—for the

answer does not say that, in addition to having no knowledge about the facts, as alleged in the bill affiant has "no information or belief" with respect to them. Of course, fullness of statement in this respect is essential, ordinarily, to the sufficiency of an answer. "Where the facts are within defendant's knowledge, he must answer positively, and not as to his information and belief; and if not within his knowledge, he must answer as to his information and not as to his information only without stating his belief." 1 Ency. Pl. & Pr., 876, 877, "if defendant answers that he has no knowledge or information of the facts charged in the bill, he need not admit or deny them, or express any belief as to them, one way or the other." 1 Ency. Pl. & Pr. 877. "It is only when he states a fact upon information or hearsay, that he is required to state his belief or unbelief." Morris v. Parker, 3 Johns Ch. 297.

Assuming that plaintiff is entitled to discovery from the answering defendant in this case, and that the ordinary equitable rules apply to this answer, the answer would be insufficient, in that respondent does not declare that, in addition to having no knowledge about the facts recited in the bill, he has "no information or belief" with respect to them. If he had answered that he had information and belief, and would give it, how much better off would the plaintiff be with respect, to making out its case? This question must be answered before we can determine whether to sustain or dismiss the exceptions. In so far as the bill seeks to obtain evidence from the defendant, the thing obtained must answer the description of evidence, and not be mere belief founded on hearsay. "An answer on information and belief, when properly put in, is sufficient as a pleading in order to present an issue; but being after all, merely hearsay, it does not operate as evidence in favor of defendant." 16 Cyc. 307. "An answer though responsive has not the effect of evidence where the facts are not within the personal knowledge of the defendant. It, as pleading, throws the burden of proof on the complainant, but can have no further weight." Lawrence v. Lawrence, 21 N. J. E. 317.

It appears from the answer as filed that respondent has no knowledge of the facts of the bill as specified in the exceptions, and, therefore, the point aimed at by the

exceptions must only have pertinency to a further answer for the purpose of defining an issue in pleading. "Information and belief"—there being no knowledge—is not evidence at all. In Eaton's Appeal, 66 Pa. 483, Justice Sharswood said: "We must lay aside the answer of the other defendant as to this point; he does not speak of his own knowledge, but from information and belief only. Such an answer is not evidence even; it is pleading merely, and puts in issue the facts in dispute." See also Socher's Appeal 104 Pa. 609. "An averment based on information and belief in an answer to a bill in equity is not evidence, but is pleading merely, and puts in issue the facts in dispute." Luburg's Appeal, 1 Mona 239; Regel v. American Life Ins. Co. 153 Pa. 134. The cases on this point are very numerous and are entirely harmonious. They are collected in Note 17, page 88, in the 6th volume of American & English Decisions in Equity.

The complainant has not alleged that the answering defendants have any personal knowledge of the facts of the bill as they are recited in the exceptions, and the defendants have already denied that they have any such knowledge; the complainant is, therefore, now insisting on the respondent's declaring in his answer what would not be evidence, one way or another, if declared, and what is not necessary to define an issue even; for the respondent, by its declared lack of knowledge and demand of proof has defined an issue that would not be altered if respondent's information and belief were declared. The function of exceptions is to secure discovery, that is to say, that which could be used as evidence. Hearsay is not evidence in a court of equity any more than it is in a court of law. If then the answer already in constitutes a pleading defining an issue that would remain unaltered if respondent did state his information and belief, what practical purpose is to be subserved by the respondent's being now compelled to add this to his answer? What is the materiality of it? In the case of Davis v. Mapes, 2 Paige Ch. 105, it was stated that "the first exception related to matters charged in the bill as having occurred between the complainants and other persons—as to which," (the Chancellor said), "it is not pretended the defendant, Mapes, has any knowledge, except from information of others. The four last relate to judicial proceedings

against another person, such as the issuing of a writ, the verdict given by a jury, and the judgment and execution founded thereon. As to all these matters, the defendant answers, in substance, that he believes they are true as stated in the complainant's bill, but that he knows nothing as to those matters, except from what is set forth in the bill; and he craves leave to refer the complainants to the proof thereof. It is insisted by complainants' counsel that the defendant should have denied all information, as well as knowledge; or that he should have admitted that he had been informed thereof. And on this ground, I presume, the master allowed these exceptions. The true way to ascertain whether an allegation in the bill or an omission in an answer is material, is to inquire whether a further answer stating or admitting the fact in that manner which would be most favorable to the complainant, would be of benefit to him. The complainant is entitled to an answer to every fact charged in the bill, the admission or proof of which is material to the relief sought or to substantiate his proceedings and make them regular * * * In this case, the defendant admits his belief in the truth of the matters alleged. If he had admitted also that he had been informed by the parties or their attorneys, but had denied all knowledge on the subject and referred the complainants to the proof thereof, would they be in any better situation as to the proof of the fact than they are, under the present answer?" After referring to an English case and the disposition made of it, Chancellor Kent thus continues: "The Lord Chief Baron assented to the proposition, as a general one, that a defendant answering was bound to answer fully; but he considered that no benefit could be derived from requiring a further answer in that case, and a further answer would only be a waste of time and expense. The exceptions were, therefore, overruled with costs. Upon the same principle, the master should have overruled these exceptions." Again, it was said in the case of Clute *vs.* Bool, 8 Paige 89: "Exceptions for insufficiency are only allowed for the purpose of obtaining a discovery of something which may benefit the complainant in the suit, and not for the mere purpose of making costs." The facts referred to in the bill and alleged to be not sufficiently answered were matters wherewith it is not pretend-

ed the answering defendant had anything to do, but wherein the complainant itself, participated. The defendant answers that it has no knowledge of them, and calls for proof. How much better off would the complainant be, if the affiant had said, in addition to what he has said, that he had been informed of the transactions, and either believed or disbelieved the information? Such additional statement would not be evidence at all. It is not apparent that the exaction of further answer on this narrow point, in view of the essential character of the case, would be of any benefit to the complainant. The answer already given discloses the nature of the defense and heresay and belief would not be admissible as evidence.

But these eleven exceptions should be dismissed for another reason. The first prayer of the bill is as follows: "Wherefore, your orator craves equitable relief in the premises, and prays: First, That the said defendants may be required to answer the premises, but not under oath, the oath being hereby expressly waived." What is that waiver of the oath for? It is solely to prevent the answer's being used as evidence at all. It is, in effect, to say to the defendants "Your answer shall disclose the nature of your defense for the purpose of defining an issue, but it is to have no evidentiary value in the case." An answer is to be sworn to only when it is to constitute evidence; when it is to be solely a pleading, there is no necessity for its being sworn to, for its function in that respect is only ancillary to the defining of an issue. It is not at all to have the nature of a deposition. "An unsworn answer is not evidence in favor of the defendant, but is mere pleading, serving simply to show what the issues are, and to put the complainant to proof of the matters alleged in the bill." Union Bank *vs.* Geary, 5 Pet. 99. "It is analagous to the general issue at law, and a single undiscredited witness will be sufficient to prove the allegations in the bill which the answer denies." Patterson *vs.* Gameo 6 Howard, 588.

In the State of Massachusetts, a statute, passed in 1883, dispensed with the making of an affidavit to an answer, except in cases of bills filed for discovery only. Exceptions were filed to an answer in a case not for discovery only, but they were dismissed. In the case, Pearson *vs.* Treadwell, 179 Mass. 462, 61 N. E. 45, the Court,

inter alia, said: "In the absence of a special rule, we think that the general rule in equity practice, must apply, and that, except in the case of answers to bills of discovery, no execption will lie for insufficiency * * * The right is, it seems to us, that except in the case of bills of discovery, answers are to be treated as pleadings merely, and, as such, the reasons for allowing exceptions to them for insufficiency ceases to exist." And "A substantative defense not responsive to the inquiries of the bill, but consisting of new matter exclusively is not the subject of exceptions. Nor are they applicable to an answer not under oath, nor where the oath has been waived." 1 Ency. Pl. & Pr. 900. "Where the answer is not under oath, exceptions will not lie, because such answer is not evidence for the party making it." Brown *vs.* Mortgage Company 110 Ill., 235, 241; Supervisors *vs.* Railway Company 21 Ill., 366; Smith *vs.* McDowell, 148 Ill., 51; 35 N. E. 141. The complainant may, if he will, waive an answer under oath, and if he does so, it is with a view to rob the answer of its evidentiary character, so that he may not, by force of it, be required at the trial to overcome its effect as an instrument of proof in behalf of the defendant. "As we shall see, the answer of the defendant cannot be used as evidence or as a deposition in the case, unless an answer under oath has been required by the complainant, except so far as its admissions are material. If the bill of complaint waives an answer under oath, the defendant cannot add to the importance of his answer; and it would have no more weight or dignity because of his voluntarily adding a jurat. But when the answer is required to be under oath, it may be used as evidence in the case; and so it becomes more important by way of discovering the mind of the defendant as to the allegations in the bill of complaint. * * * * The complainant, by requiring an answer under oath, puts the defendant upon examination as to the allegations in the bill, and the answer is, therefore, somewhat in the nature of a deposition. And if he should fail to fully and completely answer the questions of fact submitted in the allegations of the bill, the complainant may except to his answer; but if the answer under oath is waived by the complainant, then the answer stands simply as an ordinary pleading." Van Zile's Eq. Pl. & Pr. sec. 197.

The complainant, as it had the power to effectively do, waived an answer under oath, thereby designedly depriving the answer of its evidentiary aspect, and dispensing with its use as an instrument for discovering the mind of the defendant, and only making it necessary that the answer exhibit the nature of affiant's defense; but abandoning that position which it had taken in the bill, it now excepts to the answer, because it does not show the discovery which it before, in effect, had said need not be shown therein. To have added to the answer as it now is that respondent had no "information or belief" about the recited facts, would have placed no less obligation on the plaintiff with respect to its proof of the facts of its case than now rests there; under respondent's denial of his knowledge of those same facts. The utility of inserting the omitted words in any case would be but to more fully discover the mind of respondent—a thing that exceptant, in advance, had said the answer need not do. As an ordinary pleading, the answer already in shows sufficiently, the nature of defendant's defense, and calls on the plaintiff to make proof of the facts which, assuming them to be as complainant has itself stated them, would be peculiarly within complainant's own cognizance, but as to the respondent, they would be res inter alios acta. For the respondent to have added to his answer the words, the omission of which is in the exceptions complained about, would have been the additioin of what is not material to an issue, and is evidence, even if the answer was capable of being used as an instrument of evidence. It is plain too that the answer is not usable as evidence. The fuller discovery of the state of respondent's mind was, by reason of the waiver of an answer under oath, not called for in the bill, and cannot, therefore, now be exacted by exceptions. As was said by Chancellor Kent in the case of Davis *vs.* Mapes, supra, so can it be said here: "If further proof is necessary under the present answer, it would be equally so if he stated his information and belief and referring the complainants to proof of the facts." The omitted words, if inserted, would not define the issue otherwise than as it is now defined—and discovery has been waived. The answer is not exceptionable, and the first eleven exceptions are dismissed.

The eleventh one of those exceptions also relates to

the matter of an accounting, which is not sought against the now-answering defendant. The accounting that is sought by the bill is from the Avonmore Land and Improvement Company—a different defendant with a different kind of alleged liability. The answer of one defendant, even when it constitutes evidence, is not evidence for, or against, a co-defendant. "The general rule is that the answer is not evidence in favor of plaintiff against a co-defendant." 16 Cyc. 397, McElroy *vs.* Ludlum, 32 N. J. 828. "The answer of a defendant responsive to the bill is evidence against the complainant, but not against a co-defendant." Webb *vs.* Pell, 8 Paige, 368; Eckman *vs.* Eckman, 55 Pa. 269. The question of whether the Land Company should account does not concern the answering defendants, and anything they might say in their answers pertinent thereto would not be material to their own cases, and could not be used as evidence for complainant against the Land Company. It has no pertinency to any portion of the case alleged in the bill against the now-answering defendants. A respondent cannot be compelled to answer the irrelevant and immaterial matter of the bill.

In addition to what has been said above, with respect to the first eleven exceptions, the effect of Rule 37 is not to be overlooked. The whole force of this bill, in so far as the answering defendants are concerned, is dependent upon its being made to appear that the terms of Exhibit "A" have fastened a lien on their respective lots, that is still binding on them in their hands. If they purchased with knowledge, actual or constructive, of Exhibit "A," it is, of course, binding upon them, although they were not parties to the making of it, but if they were innocent purchasers without notice, it is not binding upon them, and their respective lots are, therefore, free from the obligation of any lien that Exhibit "A" may have been designed to create. The defendants deny in their answer, knowledge actual or constructive. If that defense is successfully maintained, and we cannot here decide it, we can readily see the whole case against them fails. Under the regular chancery practice and independently of our rules, a defense that goes to the whole fate of the case, in that way, could be set up by plea. "A plea avers some one matter of avoidance, or denies some one allegation in

the bill and rests the defense on that issue." Adams' Equity, 332. "A plea in equity may be said to be a pleading by which the defendant meets the case made by the bill of complaint by alleging some one fact, or several facts which, taken together, make out the one fact, and demanding the judgment of the court whether the special matter urged is not a complete defense to the action commenced by the bill. It is reducing the defense to a single question, as, for example, that the action is barred by the statutes of limitation, or the statutes of fraud; that there has been a release of the subject matter by the plainiff; that there is another suit pending between the same parties for the same subject-matter; a defect of parties; that the bill is multifarious; or any defect or defense based on a single salient fact which completely answers the case made, and upon which, if found true, the court can base a decree disposing of the bill, if not amended, and the case made by it." Van Zile's Equity Pl. & Pr. 133. It is not to be doubted but that the defense of being innocent purchasers without notice is such a salient point, as, owing to the structure of this bill, could be set up as a plea.

What then results? Equity Rule No. 37 requires that the defendant shall make answer to all the material allegations of the bill. But while it requires all defenses to be set up in the answer, yet, in doing so, it carefully protects the right which a defendant theretofore had when he defended by plea, viz: that he need not make discovery. The rule contains this: "The rule, that if the defendant submits to answer, he shall answer fully to all the matters of the bill, shall no longer apply in cases where he might, by plea or demurrer protect himself from such answer and discovery." Therefore, full answer and discovery is not demandable, with respect to the defense sustainable by plea—and yet that is what is demanded by these exceptions.

The rule continues: "And the defendant shall be entitled in all cases, by answer, to insist upon all matters of defense in law, (not being matters of abatement, or to the character of the parties, or of matters of form) to the merits of the bill, of which he may be entitled to avail himself by demurrer or plea in bar; and in such answer, he shall not be compellable to answer any other matters

than he would be compellable to answer and discover upon filing a demurrer or plea in bar and of such plea touching the matters set forth in the bill to avoid or repel the bar or defense. Thus for example a bona fide purchaser for a valuable consideration without notice may set up the defense by way of answer instead of plea, and shall be entitled to the same protection, and shall not be compellable to make any further answer or discovery of his title than he would be in any answer in support of such plea." The complainant, therefore, by its exceptions insists on the discovery that Rule 37 protects the defendant against. Whenever a plea will protect respondent from discovery, his answer will have the same effect when it sets up the same defense. Parry *vs.* Kinley, 1 Phila. 107. Our Rule No. 37, in this respect quoted above, is the same as U. S. Equity Rule No. 39. In the application of the last mentioned rule, it has been decided in the case of Gaines *vs.* Agnelly, 9 Federal Cases, No. 5173, as follows: "Under the new rule in equity, 39th, where the answer sets up a bar to the whole bill and claims the benefit of it as of a plea in bar, it is no longer a ground of exception that it does not fully answer the allegations of the bill." Fuller *vs.* Knapp, 24 Fed. 100, is to the same effect. Under equity rule 39, an answer in support of a plea in bar is not subject to exception because it fails to answer all the specific interrogatories attached to the bill." Hatch *vs.* Bancroft-Thompson Co. 67, Fed. 802. If that is true with respect to U. S. Rule No. 39, it must also be true with respect to our rule No. 37, for they are the same. There can be no question but that the defense of being an innocent purchaser without notice would constitute a proper plea in bar. "The defense that defendant is a bona fide purchaser for a valuable consideration without notice may be taken by answer as well as by plea." I Ency. Pl. & Pr. 880. Being compelled to put this defense in by answer does not subject respondent to exceptions for not making discovery. The first eleven exceptions are dismissed.

The 12th exception does not purport to be founded on any insufficiency of discovery. There are but two kinds of exceptions recognized in chancery practice, viz: 1, for insufficiency, and, 2, for impertinence or scandal. "The complainant can except to the answer for two reasons:

First, for insufficiency; second, for scandal and impertinence." Van Zile Eq. Pr. sec. 195. "Exceptions only to an insufficient discovery, or to scandal and impertinence." Bower-Barf Rustless Iron Co. *vs.* Wills Rustless Iron Co. 43 Fed. 391. Their object is to secure responsiveness in the answer, without more. This exception does not look to any required change in the terms of the answer. It asks that the defendant be compelled to elect on which of several averments in the answer, which are alleged to be inconsistent, it will stand. The exception seems to relate solely to the answer as a pleading. Without saying more on the question of the applicability of exceptions to secure the end in view, it must be admitted that a defendant in equity can no more plead inconsistent defenses than he can do so in a court of law. He cannot set up two distinct defenses in his answer, which are so inconsistent with each other that, if the matters constituting one defense are truly stated, the matters upon which the other defense is admitted to be based must necessarily be untrue, in point of fact. Hopper *vs.* Hopper, 11 Paige, 46.

The defendant can be required to elect between defenses only where the facts stated therein are so inconsistent that, if the truth of the one defense be admitted, it will disprove the other. Pavey *vs.* Pavey, 30 Ohio, 602. A pleading which affirms and also denies an essential fact shows no cause of action or defense. 6 Ency. Pl. & Pr. 270. Inconsistent defenses cannot stand, when the admission of the truth of one necessarily proves the falsity of the other. 48 L. R. A. 177. But "an answer is not inconsistent, so as to deprive defendant of its benefit, where it alleges a general conclusion and sets forth the particulars by which it is reached." Woodville *vs.* Read, 26 Md. 179. "If an answer in chancery admits that a proposal for insurance was made and accepted, but adds that no contract was made, the court will not intend that the denial includes any new matter of fact, but will treat it as only containing the respondent's view of the legal consequences of the facts admitted." Fed. Cases, No. 14372.

The inconsistency asserted in this exception lies between the paragraph first quoted therein from the answer, and those paragraphs subsequently quoted therefrom. The general language of paragraph 12 of the bill seems to

say that "since the said 26th day of August, 1898, the Avonmore Land and Improvement Company has sold sundry lots and lands out of its holdings in Westmoreland County," etc., and designates a particular deed of a particular date to one Hickman, as showing an instance of such sale and conveyance of land. The first quoted paragraph of the answer denies that any lands and tenements were conveyed to Hickman, or that the defendant, as successor to Hickman, holds any lands or tenements held or owned by the Land Company on August 26th, 1898. That is obviously the expression of respondent's construction of the deed referred to—and especially on the subject-matter upon which it operates,—a construction that is apparently at variance with the construction placed thereon by complainant. It may not be considered that this response is impertinent, inasmuch as through this deed complainant seeks to trace real estate that is subject to the alleged lien. What the recorded instrument may be called is not so important as a consideration of what it effects. With this understanding of the significance of the first quotation, its inconsistency with the other quotations is not apparent. Facts are not inconsistent if both may be true. The exception concedes that what is alleged in the answer and complained about is not destitute of legal efficacy. If the answer really alleged contrary things, it would be a legal nullity. It is a maxim that "Allegans contraria non est audiendibus." "It is a rule in equity that where defendant sets up by his answer under oath two inconsistent defenses, the result will be to deprive him of the benefit of either." Ozark Land Co. *vs.* Leonard, 24 Fed. 660. The complainant does not invoke a rule that would be applicable, if the exception were correct, but only seeks to compel an election as between defenses. "Exceptions to an answer do not lie for irregularities in the practice. By excepting for insufficiency, the complainant necessarily assumes that the answer is valid and properly before the court. Vermilye *vs.* Christie, 4 Sandf. Ch. 376.

So in this matter, the complainant does not claim that the alleged inconsistency results in nullity—but only that there should be an election, that is to say, a choice between two defenses which are both valid. We do not understand that one part of this answer asserts what

another part of it denies, and therefore, the proper occasion for compelling election is not before us. The manner of throwing the extracts from the answer into juxtaposition that is pursued in this exception, robs them of the coloring they properly have in their appropriate context. What is responsively said in an answer can only be correctly construed in view of what it replies to in the bill. In so far as the answer embodies matters of defense through facts not set up in the bill, exceptions thereto may not be filed at all.

The disposition herein made of the exceptions to the answer of the Peoples Natural Gas Company also covers the exceptions to the answers of the other defendants. The exceptions are all dismissed.

JOHN E. EVANS, ET AL. *vs.* THOMAS G. BEACH, ET AL.

Evidence—Pleading—Ejectment—When Averment Prerequisite to Proof.

In ejectment, where the thing distinctively at stake is the right of defendant's present possession, that which defendant must prove to support his right must first be pleaded.

Practice—Variance from Pleadings—Belated Motion to Amend.

An attempt by defendant to establish such right by parol evidence, without previous averment, is objectionable as a variance from the ground upon which he had, by his pleadings, elected to stand.

Defendant's informal motion at bar to amend his pleadings, without any showing by petition or otherwise to account for its being withheld until that late day, or of particulars fairly pursuasive of the fact upon which it must depend, will not be allowed as against the objection of the other side.

Evidence—Adoption—Unrecorded Writing—Proof Aliunde.

The right of adoption is statutory, though it may be exercised by deed, so called, if the instrument be recorded in the lifetime of the adopting parent. There is nothing in the case of Evans Estate, 47 Pa., Sup. Ct., 196, to support the theory that after his death an unrecorded writing may be either reformed or supplemented by parol so as to take effect as "a common law adoption."

Rule for new trial. In the Court of Common Pleas of Lackawanna County. No. 112, October Term, 1911.

T. H. Atherton, D. R. Reese and J. H. Oliver, for Plaintiffs.

R. A. Zimmerman and R. H. Holgate, for Defendants.

Newcomb, J., December 1, 1913. There was a verdict for plaintiffs in ejectment for lands in this city of which Elizabeth Evans died seized and intestate, leaving to survive her neither children nor other issue.

Plaintiffs, most of whom are non-residents of this county, claimed as her cousins and next of kin. The pedigree upon which the claim must depend was specifically averred in their pleadings, thus connecting them with the paper title which was traced regularly from the commonwealth to the deceased. At the trial this averment was supported by the testimony of a competent witness and the sufficiency of that proof was the only question submitted, with instruction that if found in plaintiffs' favor they were entitled to recover.

This view was based upon what seemed to be the only question of fact raised by the pleadings.

No doubt the averment of pedigree was essential to plaintiffs' case. It is equally true that it wasn't traversed. For, without saying anything one way or the other on the subject, defendants by their answer distinctly admitted the title as traced to the deceased, and controverted plaintiffs' right only on the ground that she had been survived by an adopted daughter, one Lillian Evans —now Bevan—who succeeded under the intestate laws and afterwards conveyed to defendants by deed, duly recited, under which they now claim.

For reasons to which reference will be hereinafter made, proof of the alleged adoption was held to have failed, so that the only question apparent on the face of the pleadings was that of plaintiffs' alleged relation to deceased as her cousins. While that had not been contested it depended on parol proof and was therefore for the jury.

But when it had become evident that the claim of adoption could not be relied upon, there was an offer to show by defendants' grantor that according to the declarations of deceased in her lifetime she had a brother in the old country; this for the purpose of defeating

plaintiffs' case by showing an outstanding title in a third party.

Objection on the ground of variance from the pleadings, which conformed to the Act of 8th May, P. L. 142, was sustained; and that gives rise to the first question involved in the present motion.

The point made by the learned counsel is that the restriction imposed by the statute which limits the proof of title to such averments as the party has set out in his pleadings, applies only to matters of affirmative character in support of his own right, and not, as in this instance, to evidence going merely to negative that of the plaintiff, more especially so in respect to that which rests in parol like proof of pedigree. Hence, it is said, that question in all its aspects was necessarily an open one regardless of the fact that the averment had been neither traversed nor questioned.

No doubt it would have been so under the former practice where, by reason of being joined on the general plea of "not guilty," the issue was at large: Watson *vs.* Gildea, 11 S. & R., 337; Coal Co. *vs.* Dewart, 95 Pa., 72. But as the procedure is now regulated, the argument will not stand analysis and proves to be merely specious rather than sound.

Bearing in mind that the averment of plaintiffs' succession as next of kin amounts in law to a link in the chain of title, it becomes apparent that its functions is precisely the same as that of a conveyance by deed or will. Hence, the test of the validity of counsel's reasoning lies in the question as to what must be regarded as matters of affirmative defense; and the key to its solution is to be found in the technical character of the action which underlies the rule that peaceable possession is the equivalent of title against everyone except him who comes with better title. Thus the action is merely possessory. It is the right of possession which is put at issue. That, and that alone, is the technical cause of action. It follows that by virtue of the statute these defendants were called upon to disclose in their pleadings by what right they claimed to hold possession. If by reason of title in themselves, either legal or equitable, it was for them to say so. And that is what they did. If they had seen fit to rely upon the mere fact of possession

because they deemed it superior to any right in the plaintiffs, it would have been an equally legitimate defense—but it would have been none the less affirmative. They would have thus affirmed their own right as against those who came without title inasmuch as that was outstanding in a third party. Moreover, it was their privilege to allege both grounds of defense. Instead of that, without any qualification whatsoever, they pleaded only a conventional fee in themselves as derived from deceased in due form of law.

If the attempt had been merely to controvert the allegation that plaintiffs were cousins of the deceased, possibly a different question would have been presented. At least on the question of their personal identity that averment of fact would have been open to contradiction on the basis which counsel had in mind. But that was not the point aimed at. The effort was not to negative that allegation, but to avoid its prime facie legal effect by introducing evidence of a countervailing fact not mentioned in their pleadings. As such, it was not essentially different from an attempt to avoid a conveyance in line of plaintiffs' title by proving an earlier deed from the same grantor to a stranger. It would hardly be contended that such proof would be admissible in the absence of anything in the pleadings to put the fact in issue.

The precise question is largely one of first impression unaided by those cases arising under local rules which provide that all material averments not specifically denied in the answer shall be taken as admitted. Yet one feels no hesitation in saying that in ejectment where the thing distinctively at stake is the right of present possession, that which defendant must prove on his own part in order to defeat a recovery, cannot be called a mere negative; but being in support of his own right must be pleaded as well as proved.

Hence, it is believed that the attempt amounted to a substantial departure from the ground upon which defendants here had by their pleadings elected to stand, and was therefore objectionable for the reason assigned.

True, there was an informal motion to amend at bar; but in the absence of any showing by petition or otherwise to account for its being withheld until that late day; or of particulars fairly persuasive of the fact upon which

it must depend, the motion could not consistently be allowed against the earnest objection of the other side, especially so in view of the moderate value of the property and the circumstance that satisfactory proofs could be had only in a foreign jurisdiction; therefore the motion was refused.

The only other question concerns the validity of the alleged adoption, which was denied. The claim was founded upon a written instrument which the appellate court had occasion to consider in Evans Estate, 47 Pa., Sup. Ct., 196, to which reference is made for the contents of the writing. The decision was adverse to the claim, but, from what was said in the course of discussion, counsel gathers the impression that its effects must be limited to the writing itself, which alone was considered at that time, and that the door was purposely left open so that in another proceeding its obvious defects both of form and substance could be supplied by proof aliunde, thus converting it into some sort of a common law adoption.

I don't so understand the case. To my mind it conveys no such suggestion. Apparently the learned president speaking for the court, with his usual caution, spoke guardedly in order not to prejudice any claim in the nature of damages for the breach of a quasi contract which under somewhat analogous relations may arise out of the disappointment of just expectations upon the faith of which valuable services have been rendered.

But that at best would suggest a common law action against the estate; not a claim of succession in title.

The supplementary proof offered here was wholly in parol consisting largely of the testimony of Mrs. Bevan whose competency might well be doubted. It was taken under objection and eventually stricken out. More deliberate reflection in the light of further argument fails to shake my confidence in the ruling then made.

Believing there was no error that would warrant us in disturbing the verdict, the rule for new trial is discharged.

BYRNE *vs.* MILLER ET AL.

Equity—Specific Performance—Description of Property—Statute of Frauds.

Where a bill for specific performance is filed to compel the conveyance of land, the completeness of the contract is an indispensable requisite, for it is that which the bill seeks to enforce, and if the contract is not complete and self-sustaining, there is nothing in the way of subject-matter that the terms of the bill can otherwise supply.

The bill for specific performance cannot rise higher than the contract which it seeks to have enforced, and, if they are less comprehensive than the bill and are insufficient, they cannot be helped by averments in the bill.

Parol testimony may be resorted to in a bill for specific performance in order to apply the terms of the description used in the writing to the land but not for the purpose of making a description not contained therein. Such evidence cannot be admitted first to describe the land sold and then to apply the description.

Descriptive language applicable to any one of several tracts of land cannot be supplemented by parol evidence as to what tract was intended.

Where a contract for the conveyance of land leaves open terms which must be settled by a future negotiation, the Court cannot specifically enforce such terms until they shall have been determined.

In the Court of Common Pleas of Westmoreland County sitting in Equity, No. 844. Demurrer to bill.

Beacom & Newill, for Plaintiff.
John E. Kunkle, for Defendants.

McConnell, J. This bill seeks to have decreed the specific performance of the contract upon which it is founded—and not only specific performance by Irwin C. Miller and Clifford E. Miller, the defendants who were parties to the making of that contract, but also by another defendant, the Wheyel Coke Company, which is the alienee from the Millers of a part of the premises to which the agreement was intended to apply. In such a case, the completeness of the written contract is an indispensable requisite, for it is that which the bill seeks to have enforced, and if it is not complete and self-sustaining, there is nothing in the way of subject matter that the terms of the bill can otherwise supply. In Parrish *vs.* Koons, 1 Parson's Equity Cases 79, it was held as follows: "It is the original contract on which the party asks and obtains his decree. If that is defective, resting only in parol, or in writing too vague and imprecise for the court to decide upon, subsequent steps in the negotiation,

such as giving instructions to the scrivner as to the drawing of the deed, examining the title-papers, etc., are not sufficient to give effect to a contract originally defective and not according to the requisition of the statute."

When it is borne in mind that the statute of Frauds and Perjuries, in so far as the sale of land is concerned, was designed to eliminate the temptation to fraud and perjury, which exists where the fact of sale continues to be provable by parol, the necessity for the entire contract's being found in the writing, become apparent. If part of the proof of the contract of sale is not found in the writing, and can be supplied by parol proof, the temptation which the statute sought to eliminate has not been removed. Therefore, to give efficacy to the Act and make it accomplish the purpose for which it was designed, it is held that the whole of the contract must be found in the writing—or the prohibition of the statute applies, and makes the insufficient form of contract wholly void.

The bill in this case asserts some things that the contract does not specifically assert; but since the bill cannot rise higher than the contract which it seeks to have enforced, we are required to look at the terms of the contract, where they are less comprehensive than the bill, to determine the sufficiency of the bill for specific performance. If the terms of the contract be insufficient, they cannot be helped out by averments in the bill. "To constitute an adequate written agreement for the sale of lands within the Statute of Frauds, it is necessary that it should state the terms of the contract with reasonable certainty, so that the substance of it could be made to appear and be understood from the writing itself, without having recourse to parol proof; otherwise all the mischiefs which the Statute of Frauds was intended to prevent would exist; nor can such a contract be partly in writing and part parol. If a contract be vague and uncertain, a court of equity will not exercise its extraordinary jurisdiction, but leave the party to his legal remedy. Nor will specific performance be enforced, unless the parties have described and identified the particular tract, or the contract furnishes the means of identifying with certainty the land to be conveyed." Parrish *vs.* Koons, 1 Pars. Sel. Eq. Cases, 79. "It is a rule in equity that the specific performance of a contract will not be decreed,

unless its terms are clear and capable of ascertainment from the instrument itself." Hammer *vs.* McEldowney, 46 Pa. 334. "Equity cannot decree specific performance of a contract in a case where the description of the real estate is insufficient." Barnes *vs.* Rea No. 2, 219 Pa. 288. "When the law requires the contract to be in writing, it means that the complete contract must be in writing. That is not a written contract that is not self-sustaining. It is verbal, if it requires verbal testimony to sustain it by proving any essential part of it." Soles *vs.* Heckman, 20 Pa. 183. "A memorandum in writing of the sale of lands to be valid within the Statute of Frauds, must not only be signed by the party to be charged, but must contain the essential terms of the contract, expressed with such clearness and certainty that they may be understood from the writing itself, or some other paper to which it refers, without the necessity of resorting to parol proof." Parkhurst *vs* Van Cortlandt, 1 Johns Ch. 273; Reed *vs.* Hornback, 4 J. J. Marsh, 377. "In order to obtain a specific performance of a contract, its terms should be so precise as that neither party can reasonably misunderstand them. If the contract be vague and uncertain, or the evidence to establish it be insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy." Colson *vs.* Thompson, 2 Wheaton, 336. These authorities, and many others of like tenor that could readily be cited, show the degree of definiteness and completeness that the writing must contain, to meet the requirements of the Statute of Frauds and prove a specifically enforceable contract. Parol testimony may be resorted to, in order to apply the terms of description used in the writing to the land, but not for the purpose of making a description not contained therein. "If the subject-matter be described parol evidence is admissible to apply the description to the land, but it cannot be admitted first to describe the land sold, and then so apply the description." Ferguson *vs.* Sarver, 33 Pa. 411. "Descriptive language applicable to any one of several tracts of land cannot be supplemented by parol evidence as to what tract was intended." Barnes *vs.* Rea, No. 2, 219 Pa. 288; Mellon *vs.* Daudson, 123 Pa. 298. "To enable a party to enforce specific performance, the agreement must contain the exact terms of the contract, and a description of the property. Where one

agreed in writing to sell a 'lot on the right hand side of S. street going towards the river, being twenty feet wide, and running back to Stewart Street,' and it appears that the vendor owned sixty feet on the right hand side of S. street, the description was too indefinite to prevent the operation of the statute of frauds." Holthouse *vs.* Rynd, 9 Sadler, 193. The bill in the case last cited sought to supplement the words of description contained in the written contract, by alleging that the lot to be conveyed was on the East side of the 60 foot lot—but such an addition to the description contained in the contract was held to be unavailing. Without that aid, the terms of description used in the writing could be applied to any part of the 60 foot lot—and, therefore, the lot to be conveyed was left indefinite.

According to the agreement annexed to the bill in this case, the Millers did "covenant and agree to grant, bargain and sell to the said second party his heirs and assigns all the coal of the Pittsburg seam in and underlying a certain tract of land situate in the Township of Sewickley, County of Westmoreland, and State of Pennsylvania, adjoining lands of Wheyel Coke Company, Mathias heirs, Philip Keller, Westmoreland Coal Company, and other lands of the parties of the first part, containing six acres, more or less." While there is provision made in the agreement for the granting of certain mining rights in the surface, yet the thing to be conveyed is "all the coal of the Pittsburg seam, in and underlying" a tract of land located by the adjoiners above named "containing six acres, more or less." From this description of the subject-matter, we should have no hesitancy in concluding that the subject-matter of the contract was six acres, more or less, of the Pittsburg seam, immediately underlying a surface of no greater area. That the area described by adjoiners is a surface area, but the stratum to be conveyed is only the coal of the Pittsburg seam immediately underlying that surface area. That is a very common way of describing a seam of coal about to be conveyed. But what seems to be a perfectly plain construction of the foregoing description is brought into some degree of doubt, when we reach the later clause of the agreement which deals with the consideration to be paid, wherein it appears that $5000.00 is

to be paid for the Pittsburg seam or vein of coal underlying the aforesaid tract, but that "in addition to a deed being executed for the coal and mining rights as hereinbefore stated as part consideration for the price or sum above stated, which is to be paid to the parties of the first part, the said parties of the first part hereby agree to incorporate in the deed for the coal unto the party of the second part, the right to open a mine or mines on the land of the parties of the first part, with the full and complete right to build a tramway or tramroads, or railroad or railroads, across any part of the balance of the tract of land now owned by the parties of the first part, which contains, including the coal above described, fifty-seven acres and one hundred fourteen and twenty-four hundredths perches (57 A. 114.24 Perches), for the purpose of operation and removing the coal from these premises," etc.

The first description had mentioned as an adjoiner "other land of parties of the first part," and the provision last quoted above from the later paragraph of the agreement seems to show that the six acres overlying the coal that is to be conveyed is not in any way dissevered from a larger body of surface, and that they together make 57 acres and 114.24 perches. But the second paragraph of the bill shows us that the adjoiners, where we had supposed the six acres of surface immediately overlying the coal to be conveyed were definitely located, are not the adjoiners of the six acres alone, but are the adjoiners of the 57 acres, and therefore, that somewhere under 57 acres and 114.24 perches of surface so adjoined, there lies these six acres, more or less, of coal which is to be the subject matter of a conveyance. If that be true, the six acres of the Pittsburg seam of coal which is to be conveyed is no more definitely fixed than that it lies under some undefined 6 acres of the 57 acres of surface. The second paragraph of the bill, after averring that the Millers were the owners in fee of 57 acres 114.24 perches of land in Sewickley Township adjoining lands of Whyel Coke Company, Mathias Heirs, Philip Kellar, Westmoreland Coal Company and other lands of the defendants, avers that they agreed to convey "all the coal of the Pittsburg seam underlying the said tract of land, supposed to be about six acres of coal, more or less." The notice of acceptance, as

given in the 7th paragraph of the bill, also describes the coal as being "all the Pittsburg vein or seam of coal underlying a certain tract of land of fifty-seven acres and one hundred and fourteen and twenty-four hundredths perches," etc. At one place in the agreement, it speaks of "the balance of that tract of land now owned by the parties of the first part which contains, including the coal above described, fifty-seven acres and one hundred fourteen and twenty-four hundredths perches," etc.

The statute of frauds deals with contracts for the conveyance of lands. The land to be conveyed here is not all the strata of either six acres, or of 57 acres—but only "all the coal of the Pittsburg seam in and underlying a certain tract of land * * * containing six acres, more or less." The other strata are not to be conveyed—although the retained title to the surface is to be subjected to the burden of certain mining rights ancillary to the utilizing of this and other coal. To specifically enforce a conveyance of real estate, we must have a definite description of that real estate, and we must find that description in the writing. Where is it in this writing? What is it? We might believe from one part of the agreement that the six acres of the Pittsburg seam of coal to be conveyed was located somewhere under 57 acres of surface—but it would have to be located very near to the center of the earth if an area of 57 acres defined by surface lines would be reduced to an area of six acres when the coal seam would be reached. Would it be supposed that six acres of coal lying somewhere under one thousand acres of surface would be sufficiently described for the purpose of conveyance if only the adjoiners of the overlying one thousand acres were given, and only the six acres of the stratum of coal was to be the subject-matter of the conveyance? It is not likely that any one would so contend. Then why should it be so contended here? On the theory of the construction now being considered, we do not know that a single adjoiner mentioned in the description in the writing is an adjoiner of the portion of the coal seam that is to be conveyed—the adjoiners named only being used to locate the 57 acres of surface. We do not know whether the six acres of coal is under the Eastern, Western, Northern, Southern, or central part of the 57 acres. We do not know whether the Pittsburg seam

underlies the whole 57 acres—or whether only six acres of the 57 acres is underlaid with coal. In short, we do not have the thing that is to be conveyed definitely located at all.

We have seen that another part of the agreement, when considered by itself, is capable of a construction that would make the adjoiners mentioned be the adjoiners of six acres of surface lying immediately over the six acres of coal, which is the thing to be conveyed. But even if we were permitted to ignore other parts of the agreement, and consider that alone as defining the subject-matter, it would, nevertheless, appear therefrom that other lands of the grantors were one of the adjoiners, without any definite fixing of the line of severance therefrom. On the whole, the agreement is vague and uncertain in identifying what is to be conveyed. "Specific execution of a contract will not be enforced, unless parties have described and identified the particular tract, or unless the contract furnishes the means of identifying, with certainty, the land to be conveyed.' Parrish *vs.* Koons, 1 Pars. Sel. Cases, 79. The uncertainties about this agreement could only be removed by the aid of parol evidence—and that is inadmissible. "A contract for the sale of lands is within the statute of frauds, and, therefore, void and unenforceable, if parol testimony be required to establish any essential part of it." Mellon *vs.* Dawson, 123 Pa. 298. In Holthouse *vs.* Rynd, 9 Sad. 193, a very full description was given in the writing of the lot that was to be conveyed, except that it was not possible to tell from it from what part of a larger lot the part to be sold was to be taken—and the court there held that the description was altogether too undefinite for a decree of specific performance. "A designation of the land as a certain quantity out of a larger described tract, as of so many acres out of a specified tract is insufficient, where the boundaries of the part are not stated, or the part has not been carved out." 36 Cyc. 592. "A contract for the sale of land in which the description lacks the certainty necessary to locate it is void. Words intended to be descriptive, but which do not in fact describe so that the parties themselves or the courts can certainly determine from the instrument itself the tract of land to be conveyed, or its location, are not sufficient to base a decree for

specific performance." Per Elkin, J., in Barnes *vs.* Rea, No. 219 Pa. 296.

This is not a case in which contemporaneously with the making of the writing a vendee has been put in possession of a definite property. This is a case in which an alleged vendee is out of possession, and a description of the property is to be found wholly in the terms of the writing. Whatever redress the plaintiff might or might not find in a court of law, the description is too vague to warrant a chancellor to decree specific performance.

Another executory right which this writing purports to give to the plaintiff is "the right to purchase any part of the land now owned by the first parties for the purpose of building houses or other buildings which may be necessary for the operation of the coal, and for this land upon which houses are to be constructed the parties of the first part * * * agree with the party of the second part to sell and convey the same by general warranty deed free of all incumbrances, to the party of the second part for the price or sum of one hundred ($100.00) dollars per acre." The 4th paragraph of the bill recites this provision and the prayers for relief do not seem to exclude a prayer for relief with respect to the right secured by this provision. Of course, it is not possible for the court to generally decree a conveyance of land that "may be necessary," for the purpose named. That provision would confer on the plaintiff the right to make choice of the necessary lands, but until it has been specifically alleged that he has done so, no case is stated which is enforceable by equitable decree. The contract must be complete—the court cannot complete it. "The contract must be complete in all its parts; that is to say, it must contain all the material terms and none of these terms must be left to be settled by future negotiations." 36 Cyc. 587. "A chancellor can only enforce an agreement specifically where the parties have agreed definitely on all its terms and left nothing to the future but mere performance." Agnew *vs.* Land Co. 204 Pa. 192. It is entirely clear that, at the time of making Exhibit "A," something was left open for future determination—that is to say, it was to be thereafter determined whether it would be necessary to secure land for the purpose mentioned, and, if so, how much, and where it be located, and what its area and

boundaries were to be. It does not appear from this bill that any of these essential things had ever been definitely fixed by action of the parties, prior to the filing of this bill. The court can only enforce the agreements that the parties have actually concluded. We cannot identify what should be conveyed under this clause.

It was said on argument that specific performance was not sought of any right given under this clause. It may be that, in the same agreement, there may be provisions that are separable, and that some of them may be specifically enforceable, while others may not be. It does not clearly appear that this bill has been framed with that possibility in view. In any event, it is entirely clear that we cannot, under this bill, decree specific performance of any right given under that clause.

For the reasons given the demurrer to the bill is sustained.

PUZA'S ESTATE.

Decedent's Estate—Priority of Lien—Estoppel.

Where a judgment creditor of a decedent's estate was induced to make a loan to decedent in his lifetime by statements of the decedent and his son that there was a judgment of but $500 in favor of the son against the property of the decedent, when in fact the amount of the son's judgment was $1,000.00, the son's judgment will not be postponed to his, so far as priority of lien is concerned. It was the subsequent creditor's duty to make an examination of the records to determine whether there were any liens against the property and not to rely wholly on the statements of the decedent and his son.

To the constitution of estoppel by acts in pais at least three ingredients seem to be necessary; first, misrepresentation, or wilful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done; and thirdly, that injury would ensue from a permission to allege the truth. And these three things must appear affirmatively.

Orphans' Court of Northumberland County. No. 16 May Term, 1911. Estate of Michael Puza. Exceptions to report of W. H. Unger, Esq., Auditor, on behalf of Frank A. Puza.

William W. Ryon for Exceptant.
C. C. Lark, contra.

Cummings, J., Nov. 17, 1913.—Michael Puza, the decedent, died intestate on the 12th day of March, 1911, leaving to survive him a widow, Rosie Puza, and two children, namely: Frank A. Puza, who is the administrator of his estate, and Mary, intermarried with Charles Yodsio.

On the 3rd day of August, 1911, Frank A. Puza, administrator, sold the real estate of the decedent, situate in Coal township, Pennsylvania, for the sum of $1,950.00 to Michael Oshinskie, which sale on report thereof, was duly confirmed by the Orphans' Court, and the sum of $1,403.58 for distribution before the auditor arises wholly from the proceeds of the sale of the said real estate and rents therefrom, the rents only amounting to $30.00.

On August 2nd, 1909, Michael Puza executed and delivered a note to Frank Puza for the sum of $1,000.00, which note provides for the payment of interest from August 2nd, 1909. This note was entered of record in the Court of Common Pleas of Northumberland County, to No. 44 December Term, 1909, on the 30th day of September, 1909. On the 12th day of April, 1910, Michael Puza executed and delivered a judgment note to Anthony Sadruck and Frances Sadruck, his wife, for the sum of $500.00, which note provides for the payment of interest from the 12th day of April, 1910; the same was entered of record in the Court of Common Pleas of Northumberland County to No. 399 May Term, 1910, on the 18th day of April, 1910. These two notes were the only judgment liens of record.

Hon. Grant Herring was appointed auditor by the court to make distribution of the balance remaining in the hands of the administrator, and, after a large part of the testimony had been taken, he died, and W. H. Unger, Esq., was appointed auditor in his stead.

Both of these judgments were presented before the auditor, and each of the plaintiffs contended that he was entitled to be first paid out of the fund in the hands of the administrator.

Frank Puza, the plaintiff, in judgment No. 44 December Term, 1909, the same being the first lien on record, claimed that his judgment was entitled to be paid in full out of the fund in the hands of the administrator, for the reason that it was the first lien, owing to its prior entry.

Anthony Sadruck, plaintiff in judgment No. 399 May Term, 1910, claimed that he was entitled to be first paid out of the fund in the hands of the administrator, and that he is entitled to priority of lien by reason of certain alleged statements having been made to him by Michael Puza in the presence of Frank Puza and by Frank Puza at the time of the borrowing of the $500.00.

Second, That he is entitled to be first paid out of the fund in the hands of the administrator for the reason that certain alleged statements were made to him on the day of the sale of the real estate by Frank Puza and Michael Oshinskie in the presence of each other, Michael Oshinskie being the purchaser of the property sold.

The auditor in his report found as a fact "that Frank A. Puza worked for his father, the decedent, from the time he was eleven years of age until some time after he was married. That Frank A. Puza on or about the second day of August, 1909, received from his wife $500.00 in cash, which he loaned to the decedent. For this work and cash the decedent gave Frank A. Puza on August 2nd, 1909, a judgment note for $1,000.00, which note bears interest from August 2nd, 1909, and provides for an attorney's commission of ten per cent. for collection. This note was entered up as a judgment in the Court of Common Pleas of Northumberland County to No. 44 December Term, 1909, on the 30th day of September, 1909, and thereby became a lien upon the real estate of the decedent. That there was no fraud or mistake in connection with the execution of the note by the decedent to Frank A. Puza for $1,000.00. It was executed in the presence of a member of the bar of Northumberland County, who drew up the note. The decedent understood what he was doing when he signed it, and it was witnessed by the attorney who drew it and afterwards entered up by him."

It was admitted and the auditor found as a fact "that on the 12th day of April, 1910, the decedent borrowed from Anthony Sadruck and Frances Sadruck the sum of $500.00 and gave a judgment note therefor, which was entered on the 18th day of April, 1910, in the Court of Common Pleas of Northumberland County to No. 399 of May Term, 1910, and became a lien upon the real estate of the decedent."

The questions raised by the exceptions filed to the

auditor's report are: First, Was there made to Anthony Sadruck and Frances Sadruck at the time of the borrowing of the $500.00 from them such representations and statements by Frank Puza and Michael Puza as would work a priority of lien on the judgment of Anthony Sadruck and Frances Sadruck over the judgment of Frank A. Puza?

Second, Whether there was made by Frank Puza and Michael Oshinskie, in the presence of each other, at the time of the sale of the real estate, such statements and promises as would work a priority of lien of the judgment of Anthony Sadruck and Frances Sadruck over the judgment of Frank A. Puza?

The auditor in his report found as a fact "that on April 12, 1910, Frank A. Puza, the plaintiff in judgment No. 44 December Term, 1909, administrator of the decedent's estate, together with the decedent, called upon Anthony Sadruck for the purpose of borrowing $500.00, for which the judgment above named was given, and, in asking for said money, Frank A. Puza stated to Anthony Sadruck that he had loaned $500.00 to his father, Michael Puza, and that there were no other judgments or liens against the estate of the decedent. That Anthony Sadruck acted upon said representations of Frank A. Puza and the decedent, and that said representations were the inducing cause of Anthony Sadruck loaning the said $500 to the decedent."

In so finding we believe that the auditor was in error. The testimony in this case will not warrant the auditor's conclusion. We believe the witness, Anthony Sadruck, incompetent. Michael Puza, the defendant in both judgments being dead, and one of the plaintiffs, Frances Sadruck, wife of Anthony Sadruck, being dead, in our opinion Anthony Sadruck was not a competent witness to testify to anything that occurred in relation to the judgment prior to the death of Michael Puza. In addition, the conversation is flatly denied by Frank Puza; besides, the judgment of Frank A. Puza at the time of this alleged conversation was a matter of record in the Court of Common Pleas of Northumberland County and it became the duty of Anthony Sadruck and Frances Sadruck, to make an examination of the records in order to determine whether or not there were any judgments or liens against

Michael Puza and not to rely wholly upon statements made by Michael Puza and Frank Puza, even if such statements had not been made.

In speaking of estoppel by acts in pais, Judge Bell in Com. *vs.* Moltz, 10 Barr, page 527, at the bottom of page 531, says: "To the constitution of this species of estoppel at least three ingredients seem necessary; first, misrepresentation, or wilful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done; and, thirdly, that injury would ensue from a permission to allege the truth. And these three things must appear affirmatively."

Even if Anthony Sadruck should be held as a competent witness the only allegation in this case is, that Frank Puza and Michael Puza made misrepresentations. There is absolutely no evidence in the case that any inquiry was made by Anthony Sadruck to ascertain whether there were any prior liens against this property. Had he made such inquiry he would have found the judgment of record for the sum of $1,000.00 in favor of Frank Puza. The proof in this particular does not warrant the auditor in finding that the judgment of Puza be postponed, so far as priority of lien is concerned, to the judgment of Anthony Sadruck and Frances Sadruck.

It was also held in the case of Mecouch and Harvey *vs.* Loughery, et al., 12 Phila., page 416: "A declaration to be effective as an estoppel, must be made to him who acts upon it, and who, after the exercise of diligence, has reason to rely upon it as true, and is thereby induced to do what he otherwise would not have done."

As to the second proposition the auditor found as a fact "that on the day of sale of the real estate of the decedent Anthony Sadruck was present and put in two bids for the real estate. And that at the request of Frank A. Puza, Anthony Sadruck ceased bidding, Frank A. Puza promising him that his, Sadruck's judgment should be first paid out of the fund, and that on account of this request and representation Sadruck ceased bidding although he was prepared to bid much higher than the property brought."

From this finding of fact the auditor found the

following conclusion of law: "That Frank A. Puza having promised Anthony Sadruck, at the time of the sale of the real estate when he was present and prepared to bid the property to a sum sufficient to cover his judgment, that if he, Sadruck, would stop bidding and allow his, Puza's father-in-law, Oshinskie, to purchase the property for them at a cheap price, that he would see that Anthony Sadruck would be paid his judgment in full, he cannot now refuse to do so and is estopped from pleading the priority of his judgment over that of Anthony Sadruck; and the Anthony Sadruck judgment must be paid in full of debt, interest, cost and attorney's fee first out of the proceeds of the sale of said real estate."

We are convinced that the auditor was in error, both as to his finding of fact and his conclusion of law. We have examined the testimony carefully and are unable to find anywhere where any promise was made by Frank Puza or Michael Oshinskie, the purchaser of the property, "that if he, Sadruck, would stop bidding and allow his, Puza's, father-in-law, Oshinskie, to purchase the property for them at a cheap price, that he would see that Anthony Sadruck would be paid his judgment in full."

While it is true that Anthony Sadruck and Roman Dauksha testified before the auditor that they had had conversation on the day of sale with Frank Puza and Michael Oshinskie relative to the purchase of the property and the payment of Sadruck's judgment, yet we feel that there was not sufficient testimony to warrant the auditor in the finding of fact and conclusion of law as was found by him, placing the judgment of Sadruck ahead of that of Frank A. Puza, which was the first lien on record. The conversation is flatly denied by Frank Puza and Michael Oshinskie and it was testified to by W. W. Ryon, a reputable attorney, who represented the Frank Puza judgment at the time of sale as follows: "I attended the sale of Michael Puza's real estate as attorney for the administrator, who is Frank A. Puza. I also represented his father, Michael Puza, in his life time. Michael Puza and Sadruck, and I am not sure but what Frank Puza was present too, came into my office and stated to me that Mr. Puza was going to borrow $500.00 of Mr. Sadruck, or words to that effect, and wanting me to write a note. My recollection is that in writing the

note I said something to him about whether he wanted it entered up, and it was understood that I should take it to Sunbury and enter it, which I did. I thought it no more than right that Mr. Sadruck should be notified of this sale. When I got to the sale or before the sale started, it has been so long since I have seen this man that I did not recognize him, I asked somebody if he was there and he was pointed out to me and I went to him and said: 'Now, Frank Puza has a judgment of $1,000.00 on record ahead of yours against Michael Puza, and if you want to get your money it will be necessasry for you to bid up enough to cover that and the interest and also the old lady's $300.00 and your own judgment.' He afterwards bid at the sale. I do not remember how high he did bid. I can't remember that."

There is absolutely no testimony that the property did not bring all that it was worth. Even though there were no contradictory statements as to the conversations alleged to have taken place between Sadruck, Oshinskie and Puza the statements alleged to have been made by them would not, in our opinion, warrant the auditor in finding as he did.

Anthony Sadruck should have, had he been willing to pay more for the property, made application to the court alleging proper grounds and his willingness to pay more, had the sale set aside and a re-sale ordered. This he failed to do.

The proceedings in this case show that it is an attempt at least on the part of Anthony Sadruck to set aside and postpone a judgment absolutely regular on its face and where, at most so far as the judgment is concerned, the reason to postpone it is a mere conflict of evidence.

"It is admitted and the auditor found as a fact that there was no fraud or mistake in the execution of the note by the decedent to Frank A. Puza for $1,000.00. It was executed in the presence of a member of the bar of Northumberland County, who drew up the note. The decedent understood what he was doing when he signed it, and it was witnessed by the attorney who drew it and afterwards entered up by him."

In the case of Kaier Company *vs.* O'Brien, 202 Pa. 153, Mr. Justice Fell says: "The measure of proof requir-

ed to send a case to a jury cannot be defined by rule, but it may be said that while a mere conflict of evidence is not generally sufficient, the defendant should be allowed a trial where he has shown by a preponderance of evidence, sufficient to sustain a verdict in his favor, that he has a just defense: Earley's Appeal, 90 Pa. 321; Jenkintown National Bank *vs.* Fulmor, 134 Pa. 337. In Mitchell on Motion and Rules, page 78, it is said: "A defendant who has only enough evidence to produce a fair conflict, ought not to prevail against a plaintiff, who has also evidence amounting to a fair conflict plus the written instrument.****The true rule, to which I believe the courts must ultimately come, is that the defendant should show a preponderance of evidence that a jury ought and probably will find in his favor."

The evidence produced on the part of Anthony Sadruck, in our opinion, surely would not warrant a jury in finding a verdict in his favor. We have no hesitancy in holding that the auditor in finding and deciding that the judgment of Frank A. Puza be postponed in point or priority to the judgment of Anthony Sadruck was not warranted by the evidence and was unquestionably contrary to law.

The exceptions filed to the auditor's report postponing the judgment of Frank A. Puza, so far as priority of lien is concerned, to that of Anthony Sadruck and Frances, his wife, are therefore sustained. There is no attempt made on the part of Anthony Sadruck and Frances, his wife, to show any payment of the $1,000.00 note. We therefore hold that the $1,000.00, interests and costs should first be paid out of the fund for distribution. The auditor was also in error in allowing attorney's commissions on any of the judgments in question. An exception is noted and bill sealed for Anthony Sadruck.

ALEXANDER'S ESTATE.

Wills—Issued d. v. n.—Delusions of Testator.

A delusion sufficient to overthrow a will must be an insane delusion, not the product of the reason, but merely a figment of the imagination. It must be something that springs up spontaneously in the mind and which rests on no intrinsic evidence of any kind.

Same—Sufficiency of Evidence.

On a petition for an issue devisavit vel non the evidence adduced by the petitioner, a daughter of the testator, showing an estrangement between them of ten years' standing, brought about largely by the petitioner and her husband leaving the residence of the testator and going to house-keeping against his wishes, and that decedent had been told that his daughter was circulating uncomplimentary stories about him, and had believed the reports. No direct evidence of mental derangement was offered, but testimony was given to show that the testator drank to excess. Held: that the evidence was not sufficient to warrant the granting of a precept for an issue.

In the Orphans' Court of Berks County. Petition for an issue devisavit vel non.

Cyrus G. Derr and E. H. Deysher for Petitioner.

E. Carroll Schaffer, Isaac Hiester and C. H. Ruhl for Legatees.

Opinion by Bushong, P. J., Jan. 6, 1914. Edgar W. Alexander, a prominent manufacturer of the City of Reading, died November 24, 1912, testate, leaving personal property appraised at $332,956.87, and real estate of a value of about $10,000.00. Mr. Alexander's first wife was the widow of B. Frank Boyer, Esq., by whom she had a number of children. She had one child by Mr. Alexander—a daughter, Nettie I. Alexander. The first Mrs. Alexander died May 11, 1897. Mr. Alexander married the present Mrs. Alexander September 10, 1903. They had no children.

Nettie, the daughter, was married to J. Harry Moyer April 5, 1899, and has two children: Josephine, born in 1900, and Dorothy, born in 1901.

By his will, dated September 4, 1912, and a codicil dated October 9, 1912, Mr. Alexander, after disposing of the bulk of his property to his wife, collateral relatives, step-children, and charities, gave five thousand dollars to each of his two grandchildren, the daughters of the Moyers, and one thousand dollars to his daughter, using the following language: "I give and bequeath to Mrs.

Nettie I. Moyer, wife of J. Harry Moyer, the sum of one thousand ($1,000.00) dollars on condition that should she take any exceptions to the provisions of this will she shall not participate in my estate to the extent of one dollar. I make this a condition in view of the unnatural conduct of the said Mrs. Nettie I. Moyer towards her deceased mother as well as myself in her relation as child and daughter."

This will was probated on December 4, 1912; and on July 12, 1913, Mrs. Moyer appealed to this Court from the decision of the Register of Wills, in admitting the will to probate; and on the same day presented a petition setting forth facts and circumstances tending, in her opinion, to show that her father had practically disinherited herself and her children because of a delusion regarding her, and praying for a precept to the Common Pleas, directing a jury trial to determine the facts in dispute. A citation was awarded on all persons interested, and an answer was filed by the executors named in the will, denying that the testator at the time of executing his last will was laboring under and actuated by any delusion. Upon the filing of a replication by the contestant, the Court proceeded to take testimony.

What kind of a delusion overthrows a will? It must be an insane delusion, not the product of the reason, but merely a figment of the imagination: Bennett's Estate (1902), 201 Pa. 485. It is "something that springs up spontaneously in the mind and which rests on no instrinsic evidence of any kind:" McGovran's Estate (1898), 185 Pa. 203, 207. Mere prejudice is not enough: Morgan's Estate (1908), 219 Pa. 355, 357. The testator's opinions of persons, however unreasonable or unworthy, can have no weight in the inquiry except it be shown that the opinion rests upon a state of facts not real but imagined. "It is never a question of soundness of view * * * * but the proper inquiry always is, whether the party imagined or conceived something to exist which did not in fact exist and which no rational person, in the absence of evidence would have believed to exist. In such a case * * * it is manifest that the only way in which said unnatural belief can be accounted for, is that it is the product of mental disorder;" McGovran's Estate, supra. The fact that a will does not come up to expectations is

not enough to show mental derangement. "A will is unnatural in a legal sense only when it is contrary to what the testator from his known views, feelings and intentions would have been expected to make. When it is in accordance with such views, it is never unnatural however much it may differ from the ordinary actions of men in similar circumstances:" Morgan's Estate, supra.

In a proceeding like the present one in order to overthrow the will because of a delusion, it is necessary for the contestant to bring forward evidence tending to show a belief in something not true, based on no evidence, and to be accounted for only by considering it as the product of mental derangement. The evidence must show more than facts merely consistent with a diseased mental condition. They must be evidence of a diseased mental condition, and there is no presumption, resulting in a shifting of the burden of proof, from any necessity of justifying the testator's opinions: McGovran's Estate, supra.

If, with this test in mind, this Court decides that a verdict against the will upon testimony taken, would be allowed to stand, an issue should be granted. If, however, the Court decides that a verdict would have to be set aside, the issue should not be granted: Bonnelly's Estate (1910), 217 Pa. 609.

In considering the evidence, the testimony of the contestant and of her witnesses will be taken as true, even though it is contradicted by the testimony of other witnesses.

What is the testimony to show a delusion? A great many witnesses testified that Mrs. Moyer was a dutiful daughter, that she was very kind to her father and mother, that she nursed her mother on her deathbed, and that both parents praised her for what she did for them. This testimony as to the mother covers the period from Mrs. Moyer's early childhood to the mother's death, and as to Mr. Alexander, comes up almost to the time when the Moyers went to housekeeping in 1902. A number of letters showing an affection for Mrs. Moyer on the part of her father were introduced. In May, 1898, the first Mrs. Alexander died, and about a year later, as has been said, Mrs. Moyer was married. Mr. Alexander hesitated about giving his consent to the marriage, because he did not want his daughter to move away, and finally con-

sented on the condition that the Moyers stay at home with him. After the wedding and a wedding trip, the Moyers came back to Reading and made their home with Mr. Alexander. The relations seem to have been at first cordial and intimate. The first unpleasantness arose when the servant, Lena, complained to Mrs. Moyer of an indecent assault upon her by Mr. Alexander, and Mrs. Moyer wrote him a letter in which she asked him how he would feel if she was subjected to the same treatment as that to which he had subjected Lena. Mr. Alexander, when he received the letter, appeared sorry, promised to be different, and did not seem to resent his daughter's conduct. A few weeks later, Mr. Alexander "forgot himself" again, when Mrs. Moyer told him that he was too good a man to fall so low. Mr. Alexander's reply was that men were weak and again did not appear to resent his daughter's talking to him. Later, Mrs. Moyer and the servant, Mary Snyder, had some difficulty getting along, because the servant did not feel that Mrs. Moyer had a right to dictate in her father's house. Finally, Mr. Moyer decided that he wanted to go to housekeeping. Mr. Alexander went out to look at the house that the Moyers had tentatively selected, but came back and said to his daughter: "I want you to stay here." This request seems to have delayed the going to housekeeping from January to August. On the Saturday before the Moyers went to housekeeping, in the morning, Mr. Alexander kicked all the tinware, which Mrs. Moyer had bought for housekeeping, down the stairs, and said he would break up everything pertaining to the moving. Referring to the moving, he said, "I won't stand for it." In the evening of the same day he came home intoxicated, told Mrs. Moyer that she would not leave alive, followed her through the house with a revolver, and finally struck her. About this time, Mr. Moyer arrived on the scene, got hold of Mr. Alexander, refused to accept his apology, because, as he told Mr. Alexander, a man who strikes a woman is a cur. After this unfortunate affair the Moyers did not see Mr. Alexander until the following Wednesday, the day they moved away. As they were leaving, Mr. Alexander promised to send some pictures to them, played with the children and kissed them, but refused to kiss Mrs. Moyer.

Emma Andrews, one of the witnesses for the contestant, testified that Mrs. Moyer said that she left her father because the servant, Mary Snyder, made it unpleasant, did not want the Moyers there, and influenced Mr. Alexander against her. To the same effect is the testimony of Kate Greenawalt, a witness for the contestant. Finally, Annie M. Coombs, called by the contestant, testified that Mrs. Moyer explained her leaving by saying that Mr. Alexander used bad language.

Shortly before the moving, Mr. Alexander said to Sophia Wilson that if Mrs. Moyer moved away he would never forgive her, and just at the time of the moving he wrote a letter to Mary Mengel, in which he said: "Yes mamie its only to true Nettie has gone to Housekeeping Finished moving I think to-day. I hope that it may be for the best and sincerely pray that it may be. But she must be & do different or it can not be. * * * If you or the World knowed one hundredth part of her actions towards me they would not think it possible to eminate from your own flesh and blood. God only Knows what I have suffered in mind the past few years * * * I last week fixed up my worldly affairs so that my labors of this Life will be placed as I elect."

The reference with respect to fixing up his worldly affairs no doubt is to the will written by Charles H. Schaeffer, Esq., in which Mrs. Moyer was neither mentioned nor provided for.

It is contended on the part of the contestant that Mr. Alexander's belief at this time that he had been badly treated in "the past few years" must have been a figment of the imagination, because of various affectionate acts on his part toward both his daughter and her children, such as his loving care of his daughter at the time of Dorothy's birth, his presenting his granddaughter, Josephine, with a silver cup on her birthday, his insisting upon phoning to his daughter and the "kiddies" from Boston and Providence very late at night, and because the facts so far detailed would not be sufficient to make a rational man disinherit his own flesh and blood. In short, it is contended that the evidence is such as to warrant a jury in finding that Mr. Alexander was mentally deranged.

The Court cannot agree with this contention. It may

be assumed for the purposes of this discussion that Mr. Alexander was unreasonable, that what he did was unworthy of a man of his standing, that, perhaps, his conduct was consistent with mental derangement; but all these assumptions are not sufficient, as we have seen, to prove a delusion. There is no proof of any kind that Mr. Alexander did more than see the facts as they were and pass a very extreme judgment upon them; and the mere extravagance of the language of his letter to Mary Mengel ought not to be considered as dependable evidence upon which to base a verdict of mental disorder.

After the Moyers went to housekeeping in August, 1902, Mr. Alexander did not come to see them. On September 19th of the same year, Mrs. Moyer's birthday, she went with the children to call on her father. He saw them at the gate of his house, but refused to speak to them.

In May, 1903, Mrs. Moyer and her children met Mr. Alexander on a street car, but he again refused to speak to them. A few days later Mr. Alexander's father died, and Mrs. Moyer, while on her way to her grandfather's house in a coupe, met her father, invited him to go with her, and he did so. He was very pleasant and told Mrs. Moyer to bring the children to his house every Saturday evening. While at the grandfather's house, Mrs. Moyer placed a chair at the bedside for her father, but he kicked it away. At the funeral, Mr. Alexander made a "big fuss" over the children.

In accordance with Mr. Alexander's invitation, Mrs. Moyer took the children to see her father every Saturday evening until the following August. He was very pleasant and sent the children a swing and Mrs. Moyer some pictures.

One Saturday in August the weekly visit was made, but Mr. Alexander was apparently intoxicated. He wanted the children to walk over the table cloth and rubbed their heads together. Mrs. Moyer objected, and he said something that made her and the children cry. The visit was no doubt unpleasant.

About a week later Mrs. Moyer called on her father. He refused to say good morning; and she then told him that she did not think he should condemn her on what other people said, that he should tell her what people said

and that until he told her it might be better if she did not call. He said nothing; she left and that was her last visit.

Mr. Alexander soon after married Mrs. Darrah; and when they got back from their wedding trip Mrs. Moyer phoned to her father and congratulated him. A few days later she met him at his sister's home, shook hands with him and told him that she should have been invited to the wedding. Mrs. Alexander, at this time, complained of an article in the Herald newspaper about Mr. Alexander's marrying his housekeeper, and said that Mrs. Moyer was accused of putting it in the paper.

After this meeting Mr. Alexander had practically nothing to do with his daughter or her children with the exception of writing the following letter to her:

"Sept 26 1903 Mrs J. Harry Moyer Madam. Most agreeable to your phone wishes of this a m I hand you per the bearer the earings of you late dear Mother. In preference to having you call at house. In which connection I wish to impress upon you once for all times that no further or future happiness this is likely to occur to sister Lillie Mrs. A. or myself, shall be interfered with or made miserable by your visits with that wicked tongue of your which you have educated to expressed about me in the lowest most scandelous vilifying & libelous character about me. I have permitted this to continue hoping you would see the terrible injustice you were doing me. But patience has ceased to be a virtue & the cup of bitter ingratituded is running over. And I will not tolerate any further scandelous use of my name and your wicked tongue must cease from henceforth or I will punish you to the fullest extend of the law. Your once father E. W. Alexander.

Show this letter to Harry as you should & then in all truth & candor tell him that 98 per cent. of the people you meet you took occasion to lie & scanlize your once father."

This letter refers to stories circulated by Mrs. Moyer, or believed by Mr. Alexander to have been circulated by her. Mrs. Moyer testified that she talked about her father to members of the family, not maliciously or unkindly, but for the purpose of helping him to do better.

Hunter Henninger testified that Mr. Alexander fre-

quently complained of Mrs. Moyer's talking about his drinking, associating with unfit people, and about her dead mother's drinking too much, objected to rumors and disliked family secrets becoming known. This testimony of the stories in circulation about Mr. Alexander, and supposedly told by Mrs. Moyer, is corroborated by other witnesses. According to Madeline Eisenbrown and Mary Mengel, Mr. Alexander did not know the story about the first Mrs. Alexander's drinking until after her death.

It also appears in the testimony that after Mr. Alexander's father's death, Mr. Alexander found a letter from Mrs. Moyer to his father enclosing some mail and money found on Seventh street after Mr. Alexander tried to drive down the railroad tracks. When Mr. Alexander discovered this letter it made him very angry.

There was, furthermore, testimony of statements made by Mr. Alexander to the effect that Mrs. Moyer was treating him shamefully; that Clause 4 in the present will was in a number of others in the same form; that Mr. Alexander made reference to his taking care of his children to an insurance man and to an employee; and that he was a hard drinker. There was no evidence, however, to show that he was intoxicated when he executed the will in question.

It may safely be asserted as a clear fact from the testimony that there were many stories afloat about Mr. Alexander which he believed to have been started by Mrs. Moyer. She, herself, tells her father not to believe what he hears without giving her a chance to defend herself, and he speaks of stories in his own letter about the earrings. Whether Mr. Alexander is to be condemned for listening to rumors and idle gossip, or, perhaps, to false stories told by persons to discredit his own child, is not a question that this Court is called upon to decide. The only inquiry is whether there is evidence from which a jury might reasonably infer that Mr. Alexander was laboring under a mental disorder; and the result of that inquiry is that there is nothing to show that he did more than take the stories as they came to him, including the story about his dead wife, believe them and pass a very severe judgment upon the daughter.

That Mr. Alexander's own grandchildren should be

cut off with five thousand dollars a piece seems particularly cruel. It is too rigid an application of the principle of visiting the supposed sins of a parent upon the children. But here again there is no evidence from which a jury might infer a delusion—no evidence that Mr. Alexander believed something that was non-existent.

In view of all the evidence, it cannot be said that there is enough in this testimony to warrant the granting of an issue. If Mr. Alexander took offense at the occurrences detailed in the testimony and determined that Mrs. Moyer was unnatural both to himself and to her mother, there is no remedy.

And now, January 6, 1914, the appeal from the Register's decision is dismissed, and a precept is refused.

THE GRAFF FURNACE CO. *vs.* THE SCRANTON COAL CO.

Mines and Mining—Vertical Support.

Where a conveyance of a lot of land by deed excepting and reserving to the grantor all coal and minerals beneath the surface of said lot, with the sole right to mine and remove the same by any subterranean process without incurring in any event whatever any liability for injury caused, or damage done, to the surface or to the buildings or improvements which now are or may hereafter be put thereon, and the deed also stipulates that the grantee does expressly release and discharge forever the grantor from any liability for any injury that may result to the surface of said premises, or anything erected or placed thereon, because of the mining and removal of said coal, etc., and it appears that the owner of the coal mined and removed the same causing injury to the surface of said lot and the improvements thereon: Held, that the owner of the said lot is not entitled to vertical support of the surface, nor is he entitled to recover damages for injury to the surface or improvements caused by mining and removing the coal.

Bill for injunction to restrain mining of underlying Coal. Decree nisi. In the Court of Common Pleas of Lackawanna County. No. 5, October Term, 1913. In Equity.

T. P. Duffy, for Plaintiff.

J. E. Burr and Warren, Knapp & O'Malley, for Defendant.

Edwards, P. J., January 28, 1914. The bill and answer in this case involve the question of the right of the plaintiff to surface support of its land from the owner of the underlying mineral estate. The prayer of the bill is for an injunction restraining the defendant from mining the coal under said land, "without leaving, or erecting, sufficient pillars and artificial supports to fully protect the surface."

The hearing on the rule for a preliminary injunction was had before my colleague, Judge Newcomb, who refused the injunction; and then the case was set down for a final hearing at a regular term of equity court. The evidence taken at the hearing on the rule was offered, and, by agreement, was admitted at the final hearing, supplemented by an agreement as to certain additional facts. Substantially, the evidence before me is the same as at the hearing of the rule.

At the time the case was called counsel on both sides were informed that I had a personal interest in the question of surface support, owning property some distance away from the plaintiff's land, yet within the same general mining zone, although having no interest whatever in the plaintiff's property. It was only at the joint and earnest request of all the counsel that I consented to hear the case.

I must state at the outset that the question of negligent mining has been taken out of the case by an amendment, and that the question of lateral support is not involved.

From the pleadings and the evidence I find the following

FACTS.

1. The Lackawanna Iron and Coal Company, prior to 1891, was the owner in fee of all the coal and surface of certain large tracts of land located on the West Side of the City of Scranton. On February 3, 1891, the said coal company, by warranty deed in fee simple, conveyed all the coal and minerals beneath the surface of the said tracts of land to the Lackawanna Iron and Steel Company, another corporation, and to its successors and assigns. The conveyance contained the following clauses:

(a) "Together with also all the rights of the said party of the first part to mine and remove the said coal

herein conveyed by any subterranean process incident to the business of mining, with the right to open mine and air shafts in any portion of the surface not sold and conveyed, but not the right to open any mine or air shaft upon any part of the surface which may be hereafter conveyed by the said party of the first part before said mine or air shaft is opened."

(b) "Also all the estate, right, title, interest, benefit, property, claim and demand whatsoever in law or equity of the said party of the first part, of, in and to the same and every part and parcel thereof, subject to the foregoing exceptions, conditions and reservations."

It appears, therefore, that the severance of the two estates was made in 1891, when the Coal Company conveyed all the coal, etc., beneath the surface, to the Steel company, the Coal company retaining its ownership of the surface of all the tracts of land. The aforementioned deed was duly recorded in the proper office.

2. On February 1, 1899, the Lackawanna Iron and Steel Company conveyed to the defendant, the Scranton Coal Company, in fee simple, all the coal and minerals beneath the surface of the lands described in said deed of February 3, 1891. The conveyance to the defendant contains the following clauses:

(a) "Together also with all the rights and immunities of the said party of the first part to mine and remove the said coal herein conveyed by any subterranean process incident to the business of mining as fully as the grantor possesses the same at the date of this deed, including such rights to open mine and air shafts upon the surface of said land as the grantor herein acquired by the deed from the Lackawanna Iron and Coal Company of February 3, 1891, or has since acquired from said company or any other source."

(b) "And together with all and singular the buildings, privileges, hereditaments and appurtenances whatsoever unto the said coal and mining rights belonging or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof; and all the estate, right title, interest, property, claim and demand whatsoever of it, the said Lackawanna Iron and Steel Company either in law or equity of, in and to the same, or any part thereof."

3. Having disposed of its mineral estate in said tracts of land to the Steel company in 1891, the Lackawanna Iron and Coal Company proceeded, from time to time, to sell certain parcels of the surface. Among the parcels so sold was a tract of about four acres, the property of the plaintiff in this case. The title of the plaintiff to said parcel of land is that of John Timmes and Herbert Hecht, whose deed of November 23, 1900, from the Lackawanna Iron and Coal Company contains the following exception and reservation:

"Excepting and reserving, however, to the said party of the first part, its successors and assigns, all the coal and minerals beneath the surface of and belonging to said lot, with the sole right to mine and remove the same by any subterranean process incident to the business of mining, and also the sole right of passage through or under the said lot, to mine and remove the coal and minerals from any other lands by any subterranean process, without thereby incurring in any event whatever any liability for injury caused or damage done to the surface of said lot or to the buildings or improvements which now are or hereafter may be put thereon, and the party of the second part, for themselves, their heirs, executors, administrators and assigns, does hereby expressly release and discharge forever the said party of the first part, its successors and assigns, and all persons who may have derived title to said coal or other minerals from said party of the first part of and from any liability for any injury that may result to the surface of said premises or anything erected or placed thereon, from the mining or removal of said coal or other minerals; provided that no mine or air shaft shall be intentionally opened or any mining fixture established on the surface of said premises."

The conveyance to the plaintiff recites, inter alia, the deed to Timmes and Hecht and contains the following clause: "This conveyance is made subject to all exceptions, reservations and conditions in said deeds mentioned."

4. The plaintiff has occupied the surface of the land with buildings used as manufacturing plant or foundry, and it employs in the neighborhood of one hundred persons in its works; and it expects to continue the

said business and the employment of such persons in the future. The defendant, in the prosecution of its mining underneath the surface of plaintiff's land, has not furnished support to the surface in lieu of the coal or such portion thereof as it has removed since its occupancy of the coal under said land, under the conveyance to it in 1899. The facts stated in this finding are admitted on the record.

5. It is also admitted specifically that the defendant, for a year or more prior to the filing of the bill in this case, has mined and removed coal from underneath plaintiff's land, without providing absolute support, and that as the result of such mining the surface of said land has been disturbed by caves or subsidences to the injury of the plaintiff in the sum of $16,000.

CONCLUSIONS OF LAW.

The plaintiff has not presented a case requiring the interference of a court of equity, and the bill of complaint should, therefore be dismissed at the plaintiff's costs.

DISCUSSION.

The consideration of this case is not complicated by such important questions as the right to lateral support, negligent or unskillful mining of coal, or the safety of persons occupying the surface where coal is taken out from underneath the land. The bare question before us is the rights of the plaintiff under the conveyance to it of the land it now occupies.

The plaintiff obtained title to its four acres of land by intermediate conveyances, from Timmes and Hecht, whose title is evidenced by the deed of the Lackawanna Iron and Coal Company, dated November 23d, 1900. Whatever rights Timmes and Hecht had under their deed, such are the rights which the plaintiff has; no more, no less. The reservation in the Timmes and Hecht deed is of a sweeping character. It excepts and reserves to the grantor "all the coal and minerals beneath the sur face * * * of said lot, with the sole right to mine and remove the same by any subterranean process incident to the business of mining, * * * without thereby incurring in any event whatever any liability for injury caused or damage done to the surface of said lot or to the buildings or improvements which now are or hereafter may be

put thereon; and the party of the second part, for themselves, their heirs, executors, administrators and assigns, does hereby expressly release and discharge forever the said party of the first part * * * from any liability for any injury that may result to the surface of said premises, or anything erected or placed thereon, from the mining and removal of said coal," etc.

This clause in the Timmes and Hecht deed is written in plain English; and with this condition in said deed, and subject to it, the plaintiff purchased its four acres of land. In the conveyance to the plaintiff it is written therein that "this conveyance is made subject to all exceptions, reservations and conditions in said deeds mentioned," meaning, among other deeds, the said deed to Timmes and Hecht. It was such a conveyance that the plaintiff accepted and placed upon record.

For further discussion of the questions in this case I refer to the opinion of my colleague on the rule for an injunction, reported in Lackawanna Jurist, Vol. 14, P. 203.

The prothonotary is directed to file the foregoing findings of fact and conclusions of law, and to enter a decree nisi, and to give notice thereof to the parties or their attorneys. Exceptions sec reg.

GOESER *vs.* VORIS.

Taxation—Convents—Parochial Schools—Act of May 14, 1874, P. L. 158.

A parochial school or a convent building necessary for the operation and management of a school are public charities and are exempt from taxation; the legal test is whether the institution unlawfully discriminates in favor of or against any part of the public.

In the Court of Common Pleas of Montour County. In Equity, No. 1, March Term, 1913.

Opinion by Evans, J., October 11, 1913:

This bill seeks to restrain collection of local taxes assessed upon grounds situate in the borough of Danville belonging to the plaintiffs whereon is erected a convent

building, for the year 1912, averring exemption from such taxes on the ground that the same is a purely public charity.

From the proofs and admissions we find the following facts:

1. St. Hubert's Catholic Church of the borough of Danville, Pa., owns ground in said borough fronting one hundred and forty-four feet on Bloom street and extending in depth of the same width one hundred and fifty feet to an alley, whereon is erected a Catholic Church, a school building and a convent building. The school building is erected at the end of the church and the convent building is approximately seventy feet east of the church and school building. All practically erected on one lot.

2. The legal title to the property is in the bishop in trust for the Roman Catholics of Danville, Pa.

3. In connection with the church, St. Hubert's congregation established and founded a parochial school a number of years ago. Since that time the said school has been kept going solely by voluntary contributions made generally by members of said congregation and Catholic friends.

4. The said school is free and open to all children who may choose to attend without regard to race, color or religion. No tuition is charged. No charge is made for books or school supplies. The Catholic faith is taught the children whose parents are of that faith. Generally children of the Catholic faith attend the school. Occasionally there are exceptions.

5. The object and purpose of the school is to teach the children of St. Hubert's congregation many of the branches that are taught in the public schools, and in addition thereto the Catholic faith. None but teachers of that faith are employed.

6. The convent building is used solely for a home for the sisters who teach in the school. One of the sisters serves as a housekeeper. The others teach in the school and live in and have their home in the building. Those who teach in the school, in addition to being provided with a home in the convent building, are each paid a salary of $7.50 per month. The congregation derives no benefit from the convent building other than furnishing

a home for the sisters who teach in the school. The sisters' salary and the cost and charges of maintaining the home for them are all paid from voluntary contributions. The convent building is part of the church and school property and is necessary for the efficient operation and management of the school.

7. Originally the ground upon which the convent building is erected was purchased with money received from voluntary contributions and subsequently the building was remodelled for a home for the sisters, who teach in the school by like contributions.

DISCUSSION.

The question in this case is, primarily, Is the school established and maintained by the trustees of St. Hubert's Catholic Church congregation of Danville, Pa., a purely public charity within the meaning of the Constitution and the act of May 14, 1874, P. L. 158, and amendments, excepting seminaries, associations and institutions of learning from taxation? And secondarily and principally, is the convent building occupied by the sisters who teach in said school necessary for the efficient maintenance and enjoyment of said school, and in consequence thereof exempt from taxation because of being a part of said school?

Art. IX, Sec. 1, of the Constitution, provides that: "The general assembly may, by general laws, exempt from taxation public property used for public purposes, actual places of religious worship, places of burial not used or held for private or corporate profit, and institutions of purely public charity."

The legislature by general law in 1874 exempted church property from taxation. Section I of the act of May 14, 1874, P. L. 158, exempts from taxation public property used for public purposes and places of religious worship and institutions of purely public charity. Section I of the act of May 14, 1874, was amended by the act of June 13, 1911, P. L. 898 to read as follows:

"Section I. Be it enacted, etc., that all churches, meeting-houses, or other regular places of stated worship, with the grounds thereto annexed, necessary for the occupancy and enjoyment of the same; . . . all hospitals, universities, colleges, seminaries, academies, associations

and institutions of learning, benevolence or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed and maintained by public or private charity; . . . be and the same are hereby exempted from all and every county, city, borough, bounty, road, school and poor tax; Provided, that all land not necessary for the convenient occupancy and enjoyment of the building thereon erected, or hereafter to be erected, shall be liable, and shall pay all local or municipal taxes of the district wherein located. This shall not be taken to include any county tax: Provided, however, that the words 'enjoyment' and 'occupancy' as used in this act, shall be construed to include only the land necessary for the convenient use of the building or buildings erected or hereafter to be erected thereon, occupied and used for the purposes above described."

1. As to the primary question: Is St. Hubert's parochial school a public charity? Is the school maintained wholly by charity? The pleadings and evidence disclose that the object and purpose of the school is to teach the children of St. Hubert's congregation many of the branches that are taught in the public schools and in addition thereto the Catholic faith. The school is open and free to all pupils who may choose to attend, without regard to race, color or religion. No tuition is charged, no charge is made for books or school supplies. The cost of maintainig the school—the keeping the school going comes wholly from voluntary contributions. The school is not kept going for profit or private gain. At times the voluntary contribution scarcely keeps the school going and it becomes necessary for those who actually keep the school going by their voluntary contributions to increase the same. In speaking for the Supreme Court, in Episcopal Academy *vs.* Phila., Appellant, 150 Pa. 565, at page 572, Mr. Justice Williams says:

"The definition of charity has been steadily broadening; it was once held to be 'whatever is given for the love of God, or for the love of your neighbor, free from any taint or stain of any consideration that is personal or selfish.' But the purity and unselfishness of the motive came to be regarded by the courts as important only in the moral aspects of the act, and was not insisted on in

determining whether a gift was to a charitable use. In Donohugh's Appeal, 86 Pa. 312, charity was defined as something 'done out of good will, benevolence, a desire to add to the happiness or improvement of our fellow beings.' The fact that selfish considerations induced the act done was thus left out of view, and the act alone considered. In the recent case of Boyd *vs.* The Fire Ins. Patrol, 120 Pa. 624, another advance was made, and the court held that a corporation acting in aid and ease of the city of Philadelphia in the preservation of life and property at fires, without gain or profit to itself, was a public charity, notwithstanding the fact that among its acknowledged objects was that of lessening the losses of fire insurance companies. In view of these cases it may be safely said that whatever is gratuitously done or given in relief of the public burden or for the advancement of the public good is a public charity. In every such case, as the public is a beneficiary, the charity is a public charity. As no private or pecuniary return is reserved to the giver or any particular person, but all the benefit resulting from the gift or act goes to the public, it is a 'purely public charity,' the word 'purely' being equivalent to the word 'wholly.' The education of youth and the support of schools are for the advancement of public good, and money given for such purposes was recognized in England as given for a charitable use, before the statute of 43 Elizabeth. Our own courts have uniformly held the same doctrine. The school (Episcopal Academy) may therefore be regarded as a purely public charity if it can meet the requirements of the law as to the manner of its founding, endowment and support. In Donohugh's Appeal, 86 Pa. 306, it was held that a purely public charity within the meaning of Art. IX, Sec. I, of the Constitution, which provides that the legislature may exempt from taxation 'institutions of purely public charity,' is not necessarily one solely controlled and administered by the state, but extends to private institutions for purposes of purely public charity, and not administered for private gain. That the essential features of a public use are, that it is not confined to privileged individuals, but is open to the indefinite public. It is this indefinite and unrestricted quality that gives it its public character."

There is no restriction with respect to pupils who

choose to attend St. Hubert's school. It is open to all children who may choose to attend without regard to race, color or religion, and it is maintained and kept going wholly by voluntary contributions. In Trustees of St. Peter's Roman Catholic Church of McKeesport *vs.* Smith, Collector of Taxes, and the City of McKeesport, 189 Pa. 222, Mr. Justice Dean, in speaking for the Supreme Court, at page 232 says: "There is nothing in the act of assembly which requires that the grant of property to a purely public charity shall be stamped with perpetuity. The only requirement is that when the institution seeks exemption, its character, whether created by charter, conveyance, articles of association or voluntary rules and regulations, shall be that of a purely public charity. If it violates its implied duty toward its contributors, equity will afford relief; if it ceases to be that on which it depends for exemption the property at once becomes subject to taxation. Nor in view of the other facts in the case is it important that the trustees are all Catholic and therefore the institution is controlled and managed by Catholics. If there was evidence tending to show exclusion of non-Catholic children, because their belief did not accord with that of the trustees, the fact would have some weight, but standing as it does by itself, it is of but little consequence. There is nothing either express or implied in the law which disqualifies a board of trustees composed of members of a single church from managing and supervising a purely public charity. A Presbyterian, Jewish or other charity may have boards of managers composed exclusively of persons of the faith indicated by the name, but if the benefits are open to all, without regard to creed, it does not affect the public character of the charity. Purely public charities are neither so abundant nor so effective that we can afford to discriminate against them because of the creed and the managing. Our discrimination must rest solely on the fact as to whether they discriminate in favor of or against any part of the public." In the light of these decisions we are of the opinion that the parochial school established and maintained by the trustees of St. Hubert's Catholic Church congregation of Danville, Pa., is a purely public charity, within the meaning of Art. IX, Sec. 1, of the Constitution, and section 1 of the act of May

14, 1874, P. L. 158, as amended by section 1 of the act of June 13, 1911, P. L. 898.

2. Is the convent building occupied by the sisters who teach in the parochial school necessary for the efficient maintenance, enjoyment and continuance of the school, and in consequence thereof exempt from taxation because of being a necessary part of the school? The evidence discloses that the convent building is but seventy feet distant from the church and school building and is not separated therefrom by a fence or anything else—all being erected on a plot of ground one hundred and forty-four feet by one hundred and fifty feet. That the title to the ground on which the convent building is erected is in the bishop in trust for the Roman Catholics of Danville, Pa. That the building is used exclusively as a home for the sisters who teach in the school; that the furnishing the sisters with a home in the building is part of the consideration they receive for teaching. The building was remodelled approximately ten years ago so as to make it a suitable home for them. The cost of remodelling was paid for out of voluntary contributions. It is also kept up and maintained from like contributions. The building is not rented to them or to any of them. The congregation derives no income or benefit therefrom other than the furnishing of a home for the sisters who teach in the school. It is of no consequence that one of the sisters acts as housekeeper for the sisters who do the teaching. Clearly the convent building is a part of the church and school property and is necessary for the efficient operation and management of the school. St. Peter's Roman Catholic Church of McKeesport *vs.* Smith, Collector, and the City of McKeesport, supra, like the case at bar was a bill to enjoin the collection of taxes assessed against a convent building. The facts in that case are stated thus by the Supreme Court, at page 225:

"St. Peter's Roman Catholic Church of McKeesport owns ground fronting two hundred and eighty feet on Market Street and extendidng back one hundred and forty feet to an alley all enclosed as one property. The legal title is in the bishop of the diocese in trust for the congregation. The church fronts sixty feet on the street, then twenty-two feet distant, the convent fronts on the same street forty feet, then twenty-two feet distant from

this is the school building, having a frontage of one hundred feet. The school building was erected in 1887, wholly by the voluntary contributions of the members of the congregation, and has since been maintained by such contributions. It is open to all, free of charge, without regard to creed, color, race or condition; at the commencement of this proceeding there were in attendance about seven hundred and fifty children; no revenue whatever is derived from it. The teachers of the school live in the convent building; which is occupied exclusively by them and no others; they are paid for their services a small salary, in addition to the privilege of residence in the convent building; they are not lesses and have no right or interest in it, except that of residence while teaching; both buildings, when projected, designed and erected, were intended for the use to which they have since been put."

The court held that the convent building was exempt from taxation. The facts in the case are not unlike those in the case in hand. In many respects there is great similarity, and in the opinion of the court that case rules the case in hand. Being of the opinion that St. Hubert's convent building at Danville, Pa., is a purely public charity, we therefore sustain the plaintiff's contention, and find as conclusions of law:

1. That St. Hubert's convent building at Danville, Pa., is not liable to assessment for local taxation.

2. That the injunction should be made perpetual restraining the collection of the taxes.

Defendant's counsel ask the court to find the following conclusions of fact and law, which, with the answers thereto, are as follows:

1. The convent building that is asked to be exempted from taxation in this case is a building in no way connected, physically, with the school nor church, but is a building that was purchased sometime in 1872 or 1874 for a home for the sisters who performed strictly church work and teaching in the private school held in the basement of the church, for which a tuition fee was charged, and is located some seventy feet east of the church building. Answer: I so find.

2. That when this convent building was purchased by St. Hubert's congregation as a home for the sisters

and at that time the only school that was maintained was a private school in the basement of the church, strictly sectarian, for which a tuition fee was charged, and the sisters or some of them were the teachers in this school; that subsequently the church building was enlarged and the school was removed to a portion of the addition added to the church and then the school was by the priest declared to be free, and the salary of the teachers was paid by the congregation and in part made up by contributions regularly collected by the congregation for that purpose. Answer: I decline to so find.

3. That the sisters who teach in the school are employed by St. Hubert's congregation and paid by the same a regular salary, and are not dependent upon the voluntary contributions collected but said voluntary contributions are for the purpose of reimbursing the congregation for the amount expended as the salary of the teachers. Answer: I so find.

4. That the convent building in question is occupied by sisters other than those teaching in the school and was originally intended and is used for a home for the sisters. Answer: I so find. One of the sisters acts as housekeeper. The fact, however, is of no consequence. The home must be cared for.

5. That the school maintained in the church building is not a purely public charity. Answer: I decline to so find.

6. That the convent building when purchased and altered and remodelled was not purchased, altered and remodelled with the intention of using it in connection with a free school or for any school and that the use that is claimed for it now was not the purpose when it was purchased by the contributions raised for that purpose. Answer: I decline to so find.

7. That the convent building is no part of the school building and is not necessary for the operation and management of the said school as now conducted. Answer: I decline to so find.

8. That the school conducted there is a strictly sectarian school conducted under the faith and discipline of the Roman Catholic Church and that it is a prerequisite to the employment of the teachers therein that they be of the Catholic faith. Answer: I decline to so find.

CONCLUSIONS OF LAW.

1. That the school conducted in this case is not a purely public charity. Answer: I decline to so find.

2. That the convent building should not be exempt from taxation. Answer: I decline to so find.

3. That the convent of St. Hubert's Catholic school is not such a purely public charity, founded, endowed and maintained by public or private charity as is entitled to be exempt from taxation under Art. IX, Sec. I, of the Constitution of Pennsylvania and the laws passed thereunder. Answer: I decline to so find.

4. That the injunction should be dissolved. Answer: I decline to so find.

In accordance with the views hereinbefore expressed the prothonotary is directed to enter and give notice of the following decree nisi:

Now, Oct. 11, 1913, this cause came on to be heard and was argued by counsel, and upon consideration thereof by the court it is ordered, adjudged and decreed as follows: That the defendants be perpetually restrained from collecting the taxes mentioned in plaintiff's bill.

AURAND *vs.* ARNOLD.

Will—Power to Sell Real Estate—Jurisdiction—Equity.

A bill in equity to enjoin a devisee and executrix under a will from selling real estate of a decedent, will be dismissed where the bill is filed in the county where the litigants reside but where the real estate is located and the will of the decedent is probated in another county.

Where a decedent by will gives his widow the power of consumption of all his estate and invests her with power to sell the same when necessary for her maintenance and support, the question as to whether such sale is necessary can only be determined by the Orphans' Court of the county in which decedent lived and died, where his property is located and where his will was probated.

Common Pleas of Northumberland County. No. 375 in Equity. Katie Aurand, otherwise Katherine Aurand, Plaintiff, *vs.* Anna Arnold, Defendant.

George B. Reimensnyder and Harry A. Coryell for the Plaintiff.

Jay G. Weiser, Andrew A. Leiser and Andrew A. Leiser, Jr., for the Defendant.

Cummings, J., March 16, 1914—Ellsworth Aurand, now deceased, was in his life time a citizen of Shamokin Dam, in the County of Snyder and State of Pennsylvania, and at the time of his death was owner of a certain lot of ground situate in the Township of Monroe, County of Snyder and State of Pennsylvania; the same being described in the bill in equity as being forty (40) feet wide and one hundred and eighty-five (185) feet deep, and located on the west side of the public road leading from Northumberland to Selinsgrove, known as the Hotel Aurand, whereon was erected a two story brick hotel and dwelling house, together with a barn and other outbuildings.

Ellsworth Aurand died on or about the 29th day of August, A. D. 1905, having first made his last will and testament bearing date the 31st day of January, A. D. 1900, wherein and whereby it was provided as follows: "I give and bequeath to my beloved wife, Anna, all my estate, both personal and real, for her maintenance during her natural life, and should there remain anything of my estate at the death of my wife, Anna, I give and bequeath the same and all that remains not consumed by my wife to my adopted daughter, Katie, formerly Coryell, by adoption, Aurand, in fee simple and forever. I constitute and appoint my beloved wife, Anna Aurand, executrix of this my last will and testament."

The said last will and testament was duly proven before the register of wills, in and for the County of Snyder, on the 7th day of September, 1905, and was entered upon the records in the office of the register of wills of said county.

The defendant, Anna Aurand Arnold, according to the bill filed, advertised the said real estate to be sold at public vendue or outcry, on the premises at Shamokin Dam, on July 30th, 1913, at one o'clock P. M.

The plaintiff in the bill, in order to stop the sale of the said property, filed her bill in equity praying that an injunction be granted preliminary until hearing, and perpetual thereafter, restraining and enjoining the defendant, Anna Aurand Arnold, from selling and disposing of the said real estate therein described, at either public or private sale, alleging in said bill that under the terms and provisions of the will Anna Aurand took only a life

estate in the real and personal estate of the said decedent, for the purpose of maintenance, during her natural life, and the remainder was given to the plaintiff, Katie Aurand, in fee simple and forever.

Second. That the defendant, Anna Aurand Arnold, being now intermarried with Samuel Arnold and being amply provided for by him, it is not necessasry to sell said premises for her maintenance.

To this bill in equity the defendant demurred, alleging, among other things, for cause of demurrer:

First. "That this court is without jurisdiction of the subject matter of said plaintiff's bill of complaint, as the land in said bill mentioned and described, as the subject of the controversy, is located in the County of Snyder and beyond the territorial jurisdiction of this court."

Second. "That this court is without jurisdiction of the subject matter of said plaintiff's bill of complaint, as the same concerns a disputed title to the lands therein mentioned and described."

Third. "That this court is without jurisdiction to try title to the land lying in Snyder County, Pennsylvania, and in said bill of complaint described and made the subject matter thereof."

Fourth. "That this court is without jurisdiction to construe the will of Ellsworth Aurand, a resident, at the time of his death, of the County of Snyder, Pennnsylvania, respecting the land in said bill described, lying and being in the said County of Snyder, to wit, not in the County of Northumberland, Pennsylvania, nor within the territorial jurisdiction of this court, and the subject matter of said bill."

As we view this case the principal question to be considered by us is that of jurisdiction.

The parties to the bill are residents of Northumberland County. The decedent, Ellsworth Aurand, was a resident of, lived and died in Snyder County. The property in question is located in Snyder County. The will of Ellsworth Aurand was probated in Snyder County.

Under the will of Ellsworth Aurand, Anna Aurand Arnold is made the primary object of his bounty. The will gives her the power of consumption, of all his estate both personal and real, thus investing her with the authority to sell and dispose of all his estate, either as

executrix or as devisee, when necessasry for her maintenance and support. The question as to when it may be necessary for the maintenance and support of Anna Aurand Arnold we think can only be decided by the court having jurisdiction of the property and of the accounts of the decedent. Whether she has a right to sell this property or not, can only be called in question before, and be determined by the Orphans' Court of the County of Snyder, where he lived and died, where the property was located and where his will was probated.

The Orphans' Court of Snyder County, in the absence of express power being given in the will for the sale either at private or public sale of the property in question, unquestionably would have a right to decree a sale of the premises mentioned in the will for the purpose of maintenance of Anna Aurand Arnold, provided that the necessity for such sale were shown. Surely the Courts of Northumberland County could not decree any such sale.

The Orphans' Court of Snyder County has jurisdiction of the settlement of accounts of the executrix and the distribution of the assets which may come into her hands, and also over all cases where they may be possessed of or are in any way accountable for any real or personal estate of the decedent. They may make such order as may be necessary, in the event a sale is decreed, for the protection of the residuary legatee so far as the fund unused realized from the sale is concerned.

It certainly cannot be contended that the Courts of Northumberland County have jurisdiction to interpret the will of Ellsworth Aurand, a resident of Snyder County, at the time of his death, respecting lands located in Snyder County, Pennsylvania.

We feel that the question of jurisdiction is too plain for any further argument and therefore sustain the demurrer and dismiss the bill in equity with reasonable costs on behalf of the defendant, Anna Aurand Arnold. An exception is noted and bill sealed for the plaintiff.

COMMONWEALTH *vs.* WARD.

Municipal Corporation—Cities of Third Class—Ordinance—Veto—Approval of Ordinance by Mayor—Ministerial Act—Constitutional Law—Act of 27 June, 1913, P. L. 568—Mandamus.

The mayor of a city of the third class has no discretionary power as to the signing of ordinances passed by a majority of the members of council. His duty in such case, under the Act of 27 June, 1913, P. L. 568, is ministerial only and if he refuses to sign an ordinance a mandamus requiring him to do so will issue.

An ordinance of a city of the third class is not effective until it is signed by the mayor and attested by the city clerk.

The Act of 27 June, 1913, P. L. 568, providing for the government of cities of the third class is not defective in title.

In the Court of Common Pleas of Delaware County. Demurrer to writ of Alternative Mandamus in No. 74 March Term, 1914.

The essential facts are stated in the opinion of the court.

A. A. Cochran, City Solicitor, for demurrer.
J. E. McDonough, Contra.

April 11, 1914. The Court: The averments of fact of the plaintiffs' petition are all admitted, from which it appears, inter alia, that an ordinance of the city of Chester was passed by city council by an affirmative vote of a majority of the members elected thereto on March 2, 1914, entitled: "An ordinance providing how contracts and agreements shall be drawn, signed and approved." Upon this ordinance being presented to the defendant as mayor for his signature, he refused to sign it.

The return of the defendant is:

1. That the Act of June 27, 1913, "does not deprive this respondent as mayor of the city of Chester of his right to refuse to sign any ordinance that he believes to be contrary to law."

2. That the said act "does not deprive this respondent as mayor of said city of discretionary right to veto any ordinance that may be passed by council."

3. That the said act is unconstitutional "because the preamble of said act does not give notice thereof as required by the provisions of the constitution of the State of Pennsylvania in such case made and provided."

And that, therefore, the said ordinance not meeting

with his approval, and being contrary to law in his opinion, he has refused to approve or sign it.

The plaintiff has demurred to this return.

As to the first two reasons, their validity depends upon the solution of the question, whether it is the official duty of the mayor to sign said ordinance. This must be determined by the Act of June 27, 1913, P. L. 568. By the second section of article 6 of this act, "Each member of council, including the mayor, shall have the right to vote on all questions coming before the council; but the mayor shall have no right to veto such acts as shall have been passed by the affirmative vote of a majority of the members elected to said council." By the sixth section of the same article, "Every legislative act of the council shall be by resolution or ordinance, and every ordinance or resolution which shall have passed said council shall be signed by the mayor and attested by the city clerk." By the seventh section of the same article, "All ordinances shall, unless otherwise provided therein or by law, take effect in ten days after their passage, upon their being signed by the mayor and attested by the city clerk."

It is manifest from this legislation that the affixing of the mayor's signature to ordinances is but a ministerial act, and involves no exercise of judgment or discretion. In the words of Judge Boyer in Commth. ex rel. *vs.* Bullock, 2 Montgomery Co. Reps., p. 5, in an analagous case, "Such signature involves no personal or official responsibility on his part, and amounts to but a certificate that such an ordinance has been passed by the council." "The true rule undoubtedly is that where the mayor or presiding officer of the city council is required simply to sign ordinances, and it is apparent that this act is ministerial in its nature and required merely to furnish evidence of the authenticity of the enactment, and the idea of approval is not involved, the requirement is directory only, and an omisssion to comply therewith will not render an ordinance invalid;" 21 Am. & Eng. Enc. of Law, p. 965. But the legislation in hand fixes the signing by the mayor and city clerk as denoting a time when the ordinance takes effect; hence it becomes necessary to have the signatures of these officers.

The third reason refers to no provision of the con-

stitution which it is claimed the Act of June 27, 1913, violates. If by the word preamble is meant the title of the act, this sets forth that it is an act providing for the government of cities of the third class.

Government of cities embraces legislation, and the part of the act under consideration relates to how legislation shall be passed. It is, therefore, clearly within the scope of the title.

It follows from the views above expressed, that the demurrer must be sustained, and we enter judgment for plaintiff on the demurrer with costs, and direct that a peremptory writ of mandamus issue as prayed for.

Opinion by Broomall, J.

SHENANDOAH WATER COMMISSION.

Ordinance—Chief Burgess—Acts of 1851, P. L. 323, Article 3—1893, P. L. 113, Article 3—1862, P. L. 471, Section 3.

The Act of 1851, P. L. 323, Article 3 requires borough officers to meet statedly, at least once a month and within ten days after their election.

The Act of 1893, P. L. 113, Article 3 requires every ordinance and resolution to be presented to the chief burgess who shall make return of his action thereon to the next regular meeting of council.

The Act of 1862, P. L. 471, section 3 defines "stated meeting" or "regular meeting" of a board of directors or controllers to be the first meeting for organization and the monthly or other periodical meetings thereafter.

If a meeting is not held because a quorum is not present, an ordinance, which was vetoed by the chief burgess and returned to the Secretary before the next regular meeting, is a nullity and no action can be taken under it.

Petition for Water Commission—No. 194 March Term, 1914.

M. M. Burke, for Petition.
J. B. Reilly and B. V. O'Hare, Contra.

Bechtel, P. J., March 2, 1914. This case comes before us on a petition presented to court, reciting, inter alia, that the petitioners are the president and secretary of the town council of the Borough of Shenandoah; that the said borough is a municipal corporation, regularly in-

corporated under the general borough law of said Commonwealth, enacted April 3, 1851; that the town council of the said borough did on the 6th day of November, 1913, enact an ordinance accepting the provisions of the Act of Assembly of the Commonwealth, approved the 5th day of June, 1913, and did in said ordinance direct the petitioners to make application to court in behalf of council for the appointment of Water Commissioners, as provided for in said Act, and a copy of the said ordinance was annexed to and made part of said petition.

At the same time there was presented to the court a petition signed by the minority members of town council of said borough, setting forth, inter alia, that the said ordinance recited in said petition was passed at a regular meeting of the town council on the 6th day of November, 1913; that the same was presented to W. J. Strollis, Chief Burgess of said borough, for his approval on the 17th of November, 1913, and returned with his veto and reasons therefore to the secretary of said council on the date of its next regular meeting thereafter, November 20, 1913; that council did not meet on said date for want of a quorum; that a meeting of town council was held November 26th, 1913, at which time said veto was in the hands of the secretary of council, but no action was taken thereon by council, nor said veto nor the reasons therefor spread upon the minutes by the secretary, as required by law; that said chief burgess had no authority to withdraw his veto after the same had been duly returned to council, and that the ordinance under which the court is now asked to take action has never been regularly passed by council, and the court has no jurisdiction to make the appointments as prayed for.

While the matter was in the hands of the court, awaiting a hearing, another petition was presented to the court in the shape of an expunging ordinance which was passed by the town council of said Borough of Shenandoah on the 8th day of January, 1914, and approved the same day by William J. Brown, Chief Burgess, which said ordinance provided, inter alia, "That whereas the ordinance of the 6th of November, 1913, had never been legally or regularly passed by council nor legally advertised nor entered upon the minutes of the council, and had been disapproved by the chief burgess and no action

taken thereon, the same has been illegally and irregularly entered in said ordinance book," and resolving that the said alleged ordinance be expugned from the records of this council, and that the solicitor be directed to withdraw same from consideration of court.

A hearing was held upon these petitions, at which it was developed that the ordinance was passed, presented to the chief burgess, vetoed and returned by him to the secretary of council, as set forth in the petition, and that there was no meeting of council for the transaction of business on the night of the 20th of November, owing to a lack of quorum.

A call was issued for a special meeting on November 26, 1913, and the meeting was called for the following purposes: "To consider and take action upon matters pertaining to Street Department and Fourth Ward sewer, Water Department and Law and Ordinance Department." Which said call was responded to by a majority of the town council, and a meeting held. At this meeting it was stated by the solicitor on the floor of the meeting that he understood that the ordinance asking the court to appoint a water commission had been vetoed by the chief burgess. The secretary was present, and at that time, according to his testimony, had in his possession the veto message of the chief burgess relative to this ordinance, but testified that he did not make known the same to the members of the town council, nor did he make any reply to the statement of the solicitor. The council, however, attempted at this meeting to pass said ordinance, and did pass the same in the shape of a resolution. Nothing further was done until the 1st of December, 1913, at which time the chief burgess withdrew his veto, and signed the original ordinance, a certified copy of which he had already vetoed.

We do not propose to consider in this opinion the effect of the expunging ordinance, so called, the power of council to pass the same, or the legality of its passage, for the reason that under our view of the case it is not necessary so to do. The question, as we view it, is, what was the effect of the action of the chief burgess relative to this ordinance, and what were his powers in relation thereto after the sending in of the veto message to the secretary of the town council.

The Act of 3rd of April, 1851, Article 3, P. L. 323, provides, "That it shall be the duty of the corporate officers to meet statedly at least once a month, and within ten days after the election of any corporate officer."

The Act of 23rd of May, 1893, Article 3, P. L. 113, provides: "Every ordinance and resolution which shall be passed by the said council shall be presented to the chief burgess of such borough. If he approve, he shall sign it, but if he shall not approve he shall return it, with his objections, to said council at the next regular meeting thereof, when said objections shall be entered at large in the minute book, and said council shall proceed to a reconsideration of such ordinance or resolution."

It is contended by counsel for the petitioners that the phrase "At the next regular meeting thereof," means a meeting at which a quorum shall be present, and that until such meeting shall be held the chief burgess may act as often and in as many different ways as he desires. We do not agree with this contention.

It will be noted that the case turns, under our view of it, upon the meaning to be given to this phrase. As shedding some light upon the construction to be placed upon the same, and the understanding of the legislature relative thereto, we cite the Act of 11th of April, 1862, P. L. 471, Section 3: "That the term 'stated meeting' or 'regular meeting' of a board of directors or controllers, whenever they occur in the act to which this is a further supplement, shall hereafter be taken to mean the first meeting thereof for organization after the annual election of directors or controllers, and the monthly or other periodical meetings held thereafter in accordance with the standing regulations of the board."

In the State, ex rel. Cline, *vs.* Wilkerville Township, 20th Ohio State Reports, page 287, it is said "By regular meeting is meant, no doubt, such meeting as the law requires to be held at a stated time and place."

The law requires at least one stated meeting of council to be held each month. In this borough there were two stated meetings to be held on the first and third Thursday of each month, and the 20th of November was a stated meeting night. The ordinance having been passed on a stated meeting night, on the 6th of November, 1913, a copy, duly certified by the proper officials

was taken to the chief burgess by the high constable for his action on the 18th of November, 1913. The law required the chief burgess to return the same, with his action thereon, at the next regular meeting. The chief burgess complied with the law, and returned said ordinance to the clerk of the town council, with his veto, and a message accompanying the same setting forth his reasons therefor. In so doing, he discharged his full duty, and, as we view this case, his connection with said ordinance in an official capacity had ceased, and the ordinance was dead until reconsidered and passed over his veto by the town council. To accept the contention of counsel for the petitioners would put it in the power of the majority of the members of a town council to prevent the chief burgess from acting in relation to an ordinance upon which the law required him to act, and this we do not believe is in accordance with the letter or spirit of the Acts of Assembly governing this case. To follow this reasoning to its natural and logical conclusion in this case—the ordinance was returned on the 20th of November. There were but two stated meetings to be held in the month of December, and in January the newly elected chief burgess would take his place. Could the town council, through neglect or refusal to do their duty, by absenting themselves at the regular meeting night, and transacting their business at meetings specially called, prevent the chief burgess from acting until the first Monday in January, and allow the new chief burgess to approve this ordinance if he saw fit to do so? It seems to us that to ask this question is to answer it. We do not believe that any court of justice, in the light of the Acts of Assembly and the decisions thereunder, could permit such action to be taken.

In Morrellville Borough's Annexation, 7 Superior Ct. R., 532, quoting from 546, it is said: "We agree with appellant's counsel that a majority of the members of council cannot effecutally prevent the mayor from exercising his veto power by neglect or refusal to attend the special meeting thus called. If, therefore, as he asserted in the court below the ordinance with his message vetoing the same directed to the common council was delivered unto the possession of its clerk at the special meeting on November 3, and the attention of the members present

was called thereto, he did all that was possible for him to do; and when the Mayor has done his full duty the statute is not to receive a construction that will make it possible for a recalcitrant majority of the council to nullify his veto by a bare refusal to do theirs."

It seems to us, in the light of these authorities and the language of the Act of Assembly, that it was the intention of the legislature, and is the reason and the spirit of the law, that a fixed time should be established at which the chief burgess should act upon the ordinances submitted to him. This fixed time was the next regular meeting of council, which time was fixed, and the date of which all knew. The fact that there was not a quorum present, which prevented the transaction of business, we do not feel can alter this time. To hold otherwise would be to fix a time of which no one could be aware, as no man could tell in advance whether or not a quorum for the transaction of business would appear on the regular meeting night. Having, therefore, discharged his full duty, and, so far as he was concerned, killed said ordinance by his veto, could the chief burgess bring it to life again by signing another copy of it, or the original, after the time had gone by in which the law said he should act? We do not believe that the reason, the spirit or the letter or the Act of Assembly or public policy would permit such action to be taken.

And now, March 2, 1914, the petition for the appointment of a Water Commission in the Borough of Shenandoah is herewith dismissed at the cost of the petitioners. By the Court.

Brumm, J., dissents.

BACKENSTOE *vs.* HUNSICKER.

Wills—Estate for Life—Rule in Shelly Case.

A devise to a daughter and her husband, or the survivor, for life, and, after their decease "to come to the children of my daughter or to their lawful heirs, share and share alike," said daughter to be charged with a certain sum to equalize her with other children, creates a life estate and not an estate in fee.

In the Court of Common Pleas of Lehigh County. Backenstoe *vs.* Hunsicker. Case Stated.

H. W. Schantz, for Plaintiff.
Fred B. Gernerd, for Defendant.

Trexler, P. J., December 29, 1913. The will of the testator provides among other things, "Second: It is my will and I do order and direct that my daughter, Mary A., now the wife of Jacob M. Backenstoe, shall have all that certain farm . . . . during the natural life of my daughter, Mary A., and her husband, Jacob M. Backenstoe, or the survivor of them, and they shall have the use, benefit and income of the same during their natural life, and after the decease of my said daughter, Mary A., and her husband, Jacob M. Backenstoe, said farm shall come to the children of my daughter, Mary A. Backenstoe, or to their lawful heirs, share and share alike, and for which farm my daughter, Mary A. Backenstoe, shall be charged the sum of Fifteen Thousand Dollars ($15,000), which sum shall be charged to her, I mean to say, said amount shall be deducted from her share of inheritance out of my estate, and each of my two other daughters, Sarah Ann, the wife of Philip E. Kemmerer, and my daughter Leah, the wife of Thomas H. Leidy, shall have the right to take Fifteen Thousand Dollars ($15,000) of my best mortgages, judgments or promissory notes, so that would bring them even with their sister, Mary A. Backenstoe." Which is altered in the testator's second codicil as follows: "And further I order and direct where I have ordered in the second item of my said annexed will that my daughter, Mary A., now the wife of Jacob M. Backenstoe, should be charged with Fifteen Thousand Dollars ($15,000), for the farm that I have ordered for her, and now it is my will and I do order that she shall only be charged Twelve Thousand Dollars ($12,000) for said farm, and my daughters, Sarah Ann, now the wife of P. E. Kemmerer, and my daughter Leah, now the wife of Dr. T. H. Leidy, shall only have the right for taking only Twelve Thousand Dollars ($12,000) each of my mortgages aforesaid in place of Fifteen Thousand Dollars ($15,000) mentioned in second item of my aforesaid will."

There seems to be little doubt as to the testator's intention. The estate of Mary A. Backenstoe is to be for life, and after the termination of the life estate to her

children or the children's lawful heirs share and share alike. The limitation of the first estate is definite.

The use of the word children certainly indicates an estate directly derived from the testator and not descended from Mary A. Backenstoe or her husband. The use of the words "children" and "heirs" show that the terms were not used interchangeably, but had each its distinct meaning in the mind of the testator.

It is argued that the expression employed by the testator stating that his children should be even in the distribution of the estate, and that the word "come" employed in indicating the passing of the estate to the children, and that there was a sum charged for the land, lead to the conclusion that a fee simple in the first taker was intended.

Notwithstanding these expressions we must not forget that the testator had a right to dispose of his estate as he pleased. We should not try to change the will even if distribution of the estate may appear to be inequitable.

Where a sum of money is required to be paid by the devisee without words of limitation a fee passes. Lobach's Case, 6 Watts, 171.

There seems to be a distinction that when a charge is made on an estate alone and there are no words of limitation the devisee takes for life, but where the charge is on the person of the devisee in respect to the estate in his hands he takes a fee by implication. But here there are words of limitation and therefore this rule does not apply. And at best this rule can only be invoked where the testator's intentions are in doubt and the devise is indefinite. Hinkle's Appeal, 116 Pa. 490.

The same may be said as to the use of the word "come" and the expression that the shares shall be even. We know not what passed in the mind of the testator when he made his will, but the words used in the instrument are supposed to express what he intended. If we construe Mary A. Backenstoe's interest as a fee what estate goes to her husband, for evidently the testator wished to give an estate equally to them? It was to be for their use, benefit and income, and to the survivor of them. If the wife died before the husband he would if the estate be a fee simple acquire the entire estate for

they held it by entireties. Thus the estate might pass to one not of the blood of the testator. This we can safely say was not the testator's intention. The testator wished to reserve the farm for his daughter and her husband for their lives. He had a right to do so, and in this regard his purpose to my mind is clearly expressed.

Now December 29, 1913, according to the terms of the case stated judgment is entered for the defendant.

YOUNG ET AL. *vs.* ZION REFORMED CONGREGATION.

Equity—Building Restrictions—Notice.

Plaintiff's bill charged defendant with violating a building restriction contained in deeds from a common grantor. Defendant demurred, on the ground that the bill failed to allege that said restrictions were placed in the deeds in pursuance of a general plan for the sale of lots, which was adopted or made known to the buyers by the common grantor. Held, that the demurrer must be dismissed.

Parties purchasing lots from a common grantor, subject to a certain building line, with notice of similar building restrictions in the deeds of other grantees from the same grantor, are bound by such restrictions, even in the absence of a general plan.

Such restrictions are treated as covenants running with the land, whenever such appears to have been the intent of the parties when the deeds were executed.

In the Court of Common Pleas of York County. No. 5, January Term, 1914. Demurrer to plaintiffs' bill.

Jno. A. Hoober and Niles & Neff for Demurrer.
J. S. Black and S. B. Meisenhelder, Contra.

April 13th, 1914. Wanner, P. J. The plaintiffs' bill is for an injunction restraining the defendant from building beyond a certain building line fixed in the deeds of both parties to this suit, for certain lots fronting on the North Side of West Maple Street, in the City of York, which lots were purchased from a common grantor, Charles Kurtz, and of which building restriction, it is alleged in the bill, that the defendant had notice before purchasing its lot.

In the deed to each of the plaintiffs for their respective lots is the following building restriction: "Subject

nevertheless to the following conditions which are made a part of the consideration for this conveyance, to wit: That the said party of the second part, his heirs and assigns shall not erect on the above described premises any dwelling house or other building within ten (10) feet of the North side of West Maple Street."

The deeds to some of those lots were duly recorded in said county before the defendant purchased its lot.

The defendant's deed contained the following restriction: "Under and subject nevertheless to the following conditions which are a part of the consideration of this conveyance to wit: The said party of the second part, its successors and assigns, shall not erect on said lot of ground any dwelling house or other building within eighteen feet of the South side of said Lafayette Street nor within ten feet of the South side of said West Maple Street.

It is conceded that there is a clerical error in this restriction, which should read "the North side of said West Maple Street," instead of the "South side" thereof.

Defendant demurs to the bill on the ground that it is not therein alleged that said building restrictions were placed in said deeds in pursuance of any general plan for the sale of lots, which was adopted or make known to buyers by the common grantor, or that there was any privity of contract or estate between the plaintiffs and the defendant.

It is true that there is no allegation in the bill, of any general plot or plan of these lots, exhibited or recorded by the grantor, in accordance with which these lots were sold, and of which the defendant had notice, or knowledge.

But it has repeatedly been held in the absence of such general plans, that parties thus purchasing lots from a common grantor, subject to a certain building line, with notice of similar building restrictions in the deeds of other grantees from the same grantor, are bound by such restrictions, which are treated as covenants running with the land, whenever such appears to have been the intent of the parties when the deeds were executed.

In Mazzarelli *vs.* Kindred, 163 Pa. 647, a common grantor of three adjoining lots which were sold to differ-

ent grantees on the same day, put a building restriction in the deed for the middle lot, with no reference to it in the deeds for the other two, except a simple recital of their conveyance on the same day. It was held that "the building restriction was in the nature of a covenant running with the land, and that it was intended to create and did create an easement of light and air, in favor of the adjoining lots," which was enforcable by injunction. This case was cited with approval in Landell *vs.* Hamilton, 175 Pa. 337; Electric City Land Co. *vs.* Coal Co., 187 Pa. 512, and in Hansell *vs.* Downing, 17 Pa. Super. Ct. Rep. 235. See also Clark *vs.* Martin, 49 Pa. 289; Wesley *vs.* Sulzer, 224 Pa. 311; Kennedy *vs.* Lutz, 60 Pa. L. J. 751; Sullenberger *vs.* Rauch, 59 Pitts. L. J. 599.

These and other similar cases seem to be conclusive against the objections raised by the demurrer to the sufficiency of the allegations contained in the plaintiff's bill. Certain other questions raised at the argument which may be material to the case hereafter, do not affect the precise legal question now before the Court.

The demurrer to the plaintiff's bill is overruled.

BRANDNER *vs.* ARBOGAST & BASTIAN COMPANY.

Negligence—Guarding of Machinery—Evidence.

The duty to guard a machine is positive, but in an action for negligence, the burden is on the plaintiff to show that the failure to guard the machine was the cause of the accident.

In the Court of Common Pleas of Lehigh County. Brandner *vs.* Arbogast & Bastian Company. Trespass.

A. G. Dewalt and Ralph H. Schatz, for Plaintiff.
Frank Jacobs and E. J. & J. W. Fox, for Defendants.

Trexler, P. J., December 22, 1913. Plaintiff was injured whilst washing a sausage stuffer. The machine was operated by compressed air. There was above the machine a control valve which admitted and shut off the power. On the side of the stuffer there was a lever projecting from it about eight inches which lever controlled the direction of the plunger sending it up or down in the

cylinder. As the plaintiff was wiping with a rag the interior or top of the cylinder, the air pressure was suddenly applied, the plunger rose rapidly and his thumb was caught and injured. He does not know how the accident happened. It came so suddenly that he does not know the cause. (pp. 1, 2, 17 of the notes of testimony.)

To impute negligence to the defendants without proof would be wrong. The plaintiff must prove his case. The doctrine of res ipsa loquitur does not apply. It is true the duty of guarding a machine is positive, but it must be shown that the failure to guard the machine was the cause of the accident. The jury cannot guess the fact.

It is true that the plaintiff had a theory that the rag which he held caught in the lever and started the machine but there was no proof to that effect.

McDonnell *vs.* Miller, 241 Pa. 61, Jones *vs.* Halceman, 61 Pitts. 335, Alexander *vs.* Water Co., 201 Pa. 252, Snyder *vs.* R. R. Co., 239 Pa. 127, Hemscher *vs.* Dolson, 230 Pa. 222.

Now December 22, 1913, judgment is now entered in favor of the defendant non obstante veredicto.

COMMONWEALTH, EX REL. *vs.* KRAPF.

Quo Warranto—Demurrer to Answer—Borough Officers—Act of April 3, 1851, P. L. 320 – Vacancies in Council.

The act of April 3, 1851, P. L. 320 provides that the officers elected serve until others are duly elected and qualified.

A resignation of a councilman creates no vacancy until it has been accepted by council and another person has been elected and duly qualifies as his successor.

A councilman may vote upon his own resignation.

Demurrer to quo warranto. No. 186, March Term, 1914.

C. E. Berger, Esq., for Writ.
Enterline and Enterline, Contra.

Koch, J., March 30, 1914. By the suggestion we are given to understand:

1st.—That the Borough of Ashland is duly incorporated under the laws of this Commonwealth.

2d.—That the said borough is divided into five wards, from each of which three members of the Town Council are elected.

3d.—That at a meeting of the Town Council held on the 5th of January, 1914, T. W. Raudenbush, who was a member of the Council from the Fourth Ward, attended said meeting, and, after his election to the office of water superintendent of the water works, he presented his resignation as a Councilman, reading as follows:

"Ashland, Jan. 5, 1914.

To the Chairman and Members of Council.

I hereby tender my resignation as a member of Council and would recommend Henry Krapf as my successor.

(Signed) T. W. Raudenbush."

4th.—Upon receipt of said resignation, it was moved that the same be accepted and the recommendation complied with, and a motion was made to amend the same by striking out the words "and the recommendation be complied with." The amendment was lost by a vote of seven to eight, said Raudenbush voting with the majority.

5th.—The original motion was then voted upon and carried by a vote of eight to seven, Raudenbush voting with the majority.

6th.—The President of the Town Council thereupon declared the resignation of the said T. W. Raudenbush accepted, and that Henry Krapf had been elected as his successor.

7th.—The said Henry Krapf immediately qualified and took the oath of office and was admitted to his seat as a member of the Council from the Fourth Ward.

8th.—"That said Henry Krapf has entered upon the discharge of the duties of his office as Councilman for the Fourth Ward of the Borough of Ashland, which said offiice, place, liberties, privileges, and franchises he, the said Henry Krapf, since January 5th, 1914, without any legal warrant, authority, appointment, or right whatsoever, hath intruded into and usurped, and still doth intrude into and usurp, that is to say, the office of Borough Councilman from the Fourth Ward of the Borough of Ashland, aforesaid, contrary to the forms of the acts of Assembly in such case made and provided, and against

the peace and dignity of the Commonwealth of Pennsylvania."

9th.—"That the election of the said Henry Krapf as a member of the Town Council from the Fourth Ward of the Borough of Ashland, was illegal and void, for the reason that the said T. W. Raudenbush had no right to vote for the election of his successor."

10th.—That notwithstanding that the election of the said Henry Krapf was illegal and void in the manner set forth, the said Henry Krapf has, since the fifth day of January, 1914, assumed the duties of the office of Councilman from the Fourth Ward of the Borough of Ashland, and has unlawfully intruded into and usurped and exercised, and still does unlawfully exercise the office, franchises, rights, duties, powers and prerogatives of Councilman from the Fourth Ward of the Borough of Ashland, aforesaid."

The answer of the defendant admits the facts as herein stated in the first, second, third, fourth, fifth and sixth paragraphs. It also admits the facts stated in the seventh paragraph, but adds that the defendant was sworn in as a member of the Council upon the advice of the Borough Solicitor and by the unanimous consent of the members who were present in Council, so that defendant's election was immediately ratified and agreed to unanimously by the entire Council.

Defendant admits that he immediately entered upon the discharge of his duties as Councilman, but denies that he has done so without legal warrant, authority or appointment or right whatsoever, or that he has intruded into and usurped the office, and claims that he holds the office by virtue of a legal election, ratification and approval of the members of the Council.

He denies the averments in the ninth paragraph in toto.

He denies the facts set forth in the tenth paragraph, so far as they relate to the illegality of his acts, but admits that he is acting as a Councilman by virtue of said election and also states that the minutes of the 5th of January, 1914, were approved and ratified at the next meeting of the Council, by a majority vote on roll call of all the members present, without the vote of the defendant being necessary to make a majority.

The defendant further claims that the meeting of the 5th of January, 1914, was a regular meeting of the Town Council.

The demurrer is, that the answer and matters contained therein are not sufficient in law to preclude the Commonwealth from having judgment of ouster upon the writ of quo warranto, and a prayer is made therein that judgment of ouster upon the said writ do issue.

Are the facts as stated sufficient in law to preclude the Commonwealth from having judgment of ouster.

When the argument was had, counsel for the relator stated that the Borough of Ashland was incorporated under a special Act of Assembly, and counsel for the respondent admitted such to be the fact, the act having been approved February 13, 1857, P. L. 36. A special act for the incorporation of Ashland became necessary because the town lay in two adjoining counties, and the court of neither county had power to incorporate it. The Borough, however, derives all its powers from the general laws of the Commonwealth, the incorporating act saying it "shall enjoy the privileges and be subject to the limitations and restrictions of the general laws of this Commonwealth relating to boroughs."

The 19th section of the Act "regulating boroughs," approved the 3rd day of April, A. D. 1851, P. L. 320, provides, "that the officers elected shall serve until others are duly elected and qualified." Where, however, any vacancy occurs in a Town Council by death, resignation, removal from the borough, or otherwise, the members of such Council have power to fill the vacancy until the next annual election for members of Town Council: Sec. 4, Act of April 3, 1851, P. L. 320. That a Councilman may resign his office is not doubted, but once he has been qualified, he shall serve until some other person is duly elected and qualified. The presentation of a Councilman's resignation creates no vacancy; the resignation must be accepted, and even then the Councilman is to serve until some one else is elected and qualified as his successsor. United States *vs.* Green, 53 Federal Reporter 769; Badger *vs.* United States, 93 U. S. 599; State *vs.* Herman, 11 Mo. App. 43. One resigning would hold over after his partial term of service until his successor was elected and qualified, the same as he would hold over at

the end of his full term of service until his successor was elected and qualified. His position would be analagous to the cases of Com. ex rel. *vs.* O'Neal, 203 Pa. 132; Com. ex rel. *vs.* Hanley, 9 Pa. 513, and Bechtel *vs.* Farquhar, 21 C. C. R. 580.

Judge Livingstone said, in Com. ex rel. McVey *vs.* LeFevre, 13 Lanc. L. R. 121, that the seat of a Councilman whose resignation has been accepted is vacant and that he could not then vote for his successor; but we think that the reasoning in the cases above quoted is sufficient for the position that we assume in this case. Besides, in this case, the resignation had not been accepted before Raudenbush voted for Krapf. Action on Raudenbush's resignation and the election of Krapf happened at one and the same time. Raudenbush could vote upon his own resignation, as well as his recommendation of Krapf as his successor.

And now, March 30th, 1914, the demurrer is overruled.

And now, March 30th, 1914, an exception is allowed plaintiff, and a bill is sealed.

COMMONWEALTH *vs.* RAMSEY.

Indictments—Motion to Quash—Bribery.

The indictment charged defendant with bribery in that as city clerk he wilfully, maliciously, unlawfully and corruptly received money for the purpose of influencing legislation of the city councils. Defendant moved to quash on the ground that the indictment did not charge an indictable offense, since he had no vote in councils and that it was entirely legitimate for him to influence legislation. Held:—sustaining the indictment, that the charge was the corrupt receipt of money as city clerk for the purpose of influencing legislation with reference to a particular subject, which is indictable.

"The modern definitions of bribery clearly include as the subjects of it all persons whose official conduct is in any way connected with the administration of the government."

Same.

A count in an indictment for bribery against a city clerk which charges the corrupt and unlawful receipt of money "in corrupt payment for his official action done and to be done in the matter of the purchase of fire apparatus" in pursuance to legislation in councils, is sufficient.

In the Court of Quarter Sessions of Berks County. No. 117 December Sessions, 1913. Motion to quash indictment.

Walter S. Young for Defendant and Motion.

Harvey F. Heinly, District Attorney, for Commonwealth.

Opinion by Wagner, J., February 24, 1914. Upon petition of the defendant, two rules were granted, first, to quash the first and second counts in the bill of indictment; second, for a bill of particulars as to the third count of the indictment. The second rule was made absolute at the argument of this case.

The first count charges that the defendant, Lincoln S. Ramsey, "then and there being the duly elected city clerk of the City of Reading, * * * did wilfully, maliciously, unlawfully and corruptly receive from one J. H. Sloan the sum of Fifty-five Dollars for the purpose of influencing legislation in the passage by councils of said city of legislation appropriating money of the said city for the purchase of fire apparatus, to wit: a tractor, for the Keystone Hook and Ladder Company, No. 1, of the City of Reading, said county."

The Commonwealth contends that this count charges common law bribery. The position taken by the defendant is that as he has no vote in councils the count does not charge an indictable offense in that it is entirely legitimate for him to influence legislation in councils. The charge, however, is not the influencing of legislation, but the corrupt receipt as the city clerk of fifty-five dollars for the purpose of influencing legislation with reference to a particular subject. The city clerk is an officer duly selected by councils of the city and is sworn "to sustain the Constitution of the United States and of this Commonwealth, and honestly to keep an account of all public moneys and property entrusted to his care, and to discharge the duties of said office with fidelity." Some of those duties in connection with the office as prescribed by ordinance are: "To keep the journal of the acts and proceedings of the select and common councils. * * * He shall record all votes, ordinances, resolutions, made and framed by city councils. * * * He shall furnish the city controller with a certified copy of all ordinances, resolutions or actions of councils pertaining to the expenditure of money in the various departments of the city. * * * He shall furnish to all heads of departments of

the city government, and to the chairman of the committees of the city councils, certified copies of such votes, resolutions or ordinances as relate to their respective departments or committees; * * * He shall sign all warrants drawn upon the city treasurer."

On account of the manner of his election, the oath required to be taken by him and his duties, the city clerkship is an important part of the legislative branch of the city government. Bribery is: "The receiving or offering any undue reward by or to any person whomsoever whose ordinary profession or business relates to the administration of public justice in order to influence his behavior in office and to incline him to act contrary to his duty and the known rules of honesty and integrity;' Co. 3 Inst., 149; 1 Hawk, Pl. Cr. C., 414; 4 Blackstone's Comm., 139; 1 Russell Crimes, 223; Clark Criminal Law, 335; 33 N. J. L., 102; 10 Ia. 212, at 221;" Com. *vs.* Turaborrelli, 19 Dist. Rep. 235, 237. Also in Com. *vs.* Warren, 20 W. N. C. 378, we have: "The modern definitions of bribery clearly include as the subjects of it all persons whose official conduct is in any way connected with the administration of the government." "The gist of the offense is said to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial. 2 Bish. Crim. Law, section 86:" In re Bozeman, 22 Pac. Rep. 628, 630. See also State *vs.* Duncan, 54 N. E. Rep. 1066.

We consider that the corrupt receipt by this defendant of money for the purpose of influencing the members of council, whose clerk he was, in the passage of legislation, falls within these definitions of bribery. But even if his conduct can not be technically included under the charge of bribery, yet we consider that the count charges an indictable offense. What was said in Com. *vs.* Brown, 23 Pa. Sup. Ct. 470, on page 492, applies to this case: "But assuming that the act of a school director in corruptly accepting money as pay for his vote or influence in the appointment of teachers is not, technically speaking, bribery, we are not required to hold that the law is so lamentably defective as not to reach such a case. The law, as thus stated in Commonwealth *vs.* McHale, 97 Pa. 397, at p. 410, would cover it: 'We are of opinion that all such crimes as especially affect public society are indict-

able at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public policy and economy.' To hold that this offense belongs to that class would not be judicial legislation, but, as has been aptly said, would be simply 'to apply old and well-established principles to a new set of facts:' Walsh *vs.* Illinois, 65 Ill. 58."

The second count in the indictment charges the corrupt and unlawful receipt of money "in corrupt payment for his official action done and to be done in the matter of the purchase of fire apparatus" in pursuance to legislation in councils. This charges the corrupt receipt of money in payment for official action done or to be done by him in certain matters. This we consider clearly falls within the charge of bribery. The second count must therefore also be sustained.

Rule to quash is discharged.

INDEX

ACTS OF ASSEMBLY CONSTRUED.
1794, April 22, Sunday Laws, 191.
1811, March 30, Taxes, 28.
1833, April 8, Wills Act 311.
1834, February 24, Decedents' Estaes, 76, 214.
1834, April 14, Partnership, 217.
1836, June 13 Foreign Attachment, 113.
1849, April 9, Exemption, 231.
1851, April 3, Boroughs, 398, 409.
1851, April 15 Action for Negligence Not Abated by Death, 117.
1855, April 26, Action for Negligence After Death, 117.
1856, April 9, Corporations, 202.
1862, April 11, Schools, 398.
1864, April 24, Partition, 44.
1874, May 14, Taxation, 383.
1877, March 23, Schools, 156.
1879 July 7, Affidavit of Claim, 182.
1887, May 23, Witnesses, 117, 315.
1887, May 25, Water Rights of Boroughs, 22.
1889, June 7, Corporation Loan Tax, 28.
1891, May 26, Preparing and Keeping Indices in Several Offices of County, 107.
1893, May 23, Boroughs, 398.
1893, May 23, Fees, 76.
1895, June 24, Tenants in Common, 44.
1901, June 4, Municipal Liens, 317.
1905, May 2, Industrial Establishments, 163.
1906, February 15, Legislative Apportionment, 174, 183.
1906, March 5, County Bridges, 190.
1907, April 15, Water Rights of Boroughs, 22.
1907, May 7, Free Hydrophobia Treatment, 33.
1907, June 10, Employers' Liability, 95.
1909, April 27, Legislative Apportionment, 174.
1911, June 11, Private Banks, 220.
1913, June 27, Municipalities of Third Class, 396.
ADOPTION.
1. Deed of adoption must be recorded in life time of adopting parent, 349.
APPORTIONMENT. See STATUTES.
1. Amending Act of Feb. 15, 1909, P. L. 213, is confined in its operation to legislative districts of Pittsburg, 174.
2. A representative district under Act of Feb. 15, 1906, can be changed only by Act of Legislature, 183.
ASSIGNMENT FOR BENEFIT OF CREDITORS. SEE SUBROGATION.
ATTACHMENT EXECUTION. SEE JUSTICE OF THE PEACE.
BAILMENT. SEE SALES.
BANKRUPTCY.
1. A bankrupt claiming his exemption must select it from the property owned by him not the proceeds of a sale of such property, 231.

BILLS AND NOTES.
1. Want of consideration no defense to a note under seal, 76.
2. A judgment note not of record may be presumed to be paid under certain circumstances, 177.
BONDS.
1. Sureties are liable to full amount on appeal to Superior Court; credit for costs paid by defendant not allowable, 53.
BOROUGHS.
1. May pass ordinances regulating hawking and peddling, 97.
2. An ordinance with a general repealer clause repeals an earlier ordinance on the same subject, 97.
3. Resignation of a councilman creates no vacancy until same is accepted by council and a successor elected and qualified, under Act of 1851, P. L., 320, 409.
4. A councilman cannot vote upon his own resignation, 409.
5. Damages are recoverable against a borough for grading street although previously laid out and for grading sidewalk, 293.
6. If meeting was not held because of lack of quorum, an ordinance which was vetoed by burgess and returned before the next regular meeting is a nullity and cannot be acted upon, 398.
BUILDING ASSOCIATIONS. SEE CORPORATIONS.
CASE STATED. SEE PRACTICE.
COMMON CARRIERS. SEE INTERSTATE COMMERCE.
1. Lien for arrearages on previous shipments may be extended to subject certain goods by agreement, 58.
2. Estopped from asserting lien for previous shipment where no notice of such claim is given and usual delivery receipt is taken from consignee, 58.
CONSTITUTIONAL LAW.
1. Title of Act of April 15, 1907, P. L., 90, is constitutional, 22.
2. Act of May 7, 1907, P. L., 170, providing for free treatment in hydrophobia cases declared unconstitutional, 33.
3. Act of May 26, 1891, P. L., 129, empowering court to change, alter and direct mode of keeping indices in the several offices' declared constitutional, 107.
4. An Act, not embraced within Governor's call for a special session, is unconstitutional, 190.
5. Title of Act of June 27, 1913, P. L., 568, governing cities of the third class is not defective, 396.
6. Act of June 11, 1911, P. L., 1064, not defective in title, 220.
7. The unconstitutionality of one section will not affect the whole Act if there remains an intelligent piece of legislation, 220.
CONTRACTS.
1. Where the terms of a lease of slate lands for royalty are uncertain, jury may determine royalty, 192.
2. A contract to be paid after the death of testator for services may be too indefinite to be enforced, 194.
3. Promise to pay goods furnished to another is a contract of surety; it is immaterial that goods furnished exceeded amount fixed in contract, 197.
CONVERSION.
1. A clear and express direction to sell real estate converts it into personalty, 76.
CORPORATIONS. SEE TAXES.
1. One who deals with a corporation as such cannot attack its validity collaterally, 25.
2. Stockholders could not be held as individuals until it was shown that corporation was not liable as a corporation, 25.

3. A receiver will not be appointed to wind up a corporation when the execution of a creditor would be affected and insolvency is the only reason alleged in bill, 202.
4. When a payment of a loan to a building association was made with bank stock which was used by secretary for the benefit of the association, the objection of ultra vires cannot be raised against payment, 286.

COVENANTS RUNNING WITH THE LAND.
1. A building restriction in deeds coming from a common grantor are covenants running with the land, 406.

CRIMINAL LAW.
1. Bribery includes as the subjects of it all persons whose official conduct is in any way connected with the administration of government, 413.
2. Separate felonies of same general nature are chargeable in separate counts of the same indictment, if triable in the same manner and punishable similarly, 56.
3. To sustain a conviction of larceny by bailee, must appear that identical property was to be returned after purposes of the bailment had been accomplished, 267.
4. An indictment will be sustained which charges the corrupt receipt of money by a city clerk for the purpose of influencing legislation in councils, 413.

DECEDENTS' ESTATES.
1. Special legatees must be satisfied before there can be a residuary estate, 1.
2. Exceptant who wins fund for all legatees is entitled to have counsel fee borne by all equally, 1.
3. Tombstone is a proper item of expense, 76.
4. Fence around cemetery lot not proper item of expense, 76.
5. Fee for appraisement is one dollar per day, 76.
6. Lien of debts not divested by sale of real estate within two years, 76.
7. Fee paid bookkeeper for stating an account is allowable, 76.
8. Wages fof servant allowed on quantum meruit, 76.
9. A contract to pay a good share of estate after death of testator in addition to weekly salary is too indefinite, 194.
10. Cost of tombstone not a part of funeral expenses nor a preferred claim against estate within Act of February 24, 1834, Sec. 21, P. L., 76, 214.

DEEDS.
1. Restriction against erection of building within 65 feet of side of street will not prevent erection of house on rear of lot, 65.

DIVORCE.
1. Court cannot open or vacate a decree on ground of after discovered evidence after term at which it was entered, 26.
2. Libel must be presented to court of county in which libellant resides, 152.
3. Affidavit to libel must be made before a proper official of the county in which libellant resides, 152.
4. Separation by agreement is not desertion, 270.
5. What constitutes cruel and barbarous treatment, 270.
6. There may be condonation of prior acts of cruel and barbarous treatment, 270.
7. Master should examine witnesses first according to rule of court, 27.

EASEMENT.

1. Where water, flowing through land, is used for 21 years under claim of right an easement by prescription is established, 110.

2. A stipulation contained in deeds of three contiguous lots that 15 feet at rear of lots should be opened for an alley, and land forms a cul de sac; after twenty years owners of lots my release easement in face of objection from municipality, 253.

EJECTMENT. SEE PRACTICE C. P.

EQUITY.

1. Injunction will not issue to restrain erection of building in rear of lot where restriction in deeds prohibits erection within certain number of feet from side of street, 65.

2. Equity will not determine a right which party to cause has no standing to raise, 144.

3. One who has privilege of using adjoining land in erection of a building may use it a reasonable time and injunction will not lie restraining use, 256.

4. Equity will not enjoin the painting of a sign upon a party wall on side continued above the roof of building, 276.

5. As to requirements of an answer to a bill in equity, 331.

6. Bill for specific performance cannot supply by averments deficiencies in the contract; the latter must be complete and self-sustaining, 354.

7. Is not necessary to allege in bill to enforce building restrictions in deed, from a common grantor, that general plan of lots was made known to buyers, 406.

EVIDENCE. SEE VERDICT.

1. Court canhot withdraw from jury a question which belongs to them upon assumption of probable prejudice, sympathy or lack of comprehension, 242.

2. Widow may testify against estate matters not confidential communications, 76.

3. Letters signed on typewriter admissable, 240.

4. Spontaneous utterances are admissible as part of res gestae, 258.

5. When a case has been tried on theory of an oral contract, defendant cannot later ask that verdict be disturbed when he had in his possession a written contract and did not produce same, 196.

6. A non-expert witness may express opinion as to rate of speed of automobile, 258.

7. A husband may not be called as of cross-examination against his wife doing business under a firm name, 315.

8. Attempt to establish right of possession, by parol, in a suit in ejectment without previous averment is objectionable, 349.

EXECUTOR.

1. Executor is entitled to two and one-half per centum for responsibility and a fair compensation for his trouble, 1.

FEES. SEE JUSTICE OF PEACE.

FELLOW SERVANT. SEE NEGLIGENCE.

FOREIGN ATTACHMENT.

1. A wife who has separated from her husband in Pennsylvania, moved to New York and resided there for four years is not a "resident within this Commonwealth," 113.

HUSBAND AND WIFE. SEE EVIDENCE.

1. If a wife leaves a husband with justification she may acquire a domicile of her own in another stae, 113.

2. Former husband cannot claim possession of real estate of wife sold on execution, on the ground that valuable improvements were made thereon by him, 200.

HAWKING AND PEDDLING. SEE BOROUGHS.

INDICES. SEE CONSTITUTIONAL LAW.

1. What is an alphabetical system of indexing, 107.

INDUSTRIAL ESTABLISHMENTS. SEE MASTER AND SERVANT.

INSURANCE.

1. Insurance contract may be parol, 69.

2. Proof of authority on part of agent must be shown to extend insurance contract beyond terms in original policy, 69.

INTERSTATE COMMERCE ACT.

1. A common carrier may recover from a shipper the difference between the legal published rates under the Interstate Commerce Commission and the rate paid, after shipment has been made, 127.

JUDGMENT.

1. The name of a party named by the description "and wife," cannot be added on a writ of Scire Facias to revive, 40.

2. The lien of a judgment against a tenant in common in possession is subject to the rights of the tenant out of possession, 44.

3. The defendant having been discharged in bankruptcy, the revival of a judgment entered previous to the discharge will be restricted to the real estate originally bound by it, 201.

JURISDICTION.

1. Question of whether a sale is necessary under a will can only be determined by the Orphans Court of the County in which decedent lived and died, where his property is located and where his will was probated, 392.

JUSTICE OF THE PEACE.

1. A justice of the peace has no jurisdiction in a suit for damages resulting from a refusal to permit removal of growing crops, 55.

2. A justice is allowed fees in only one case where one prosecutor brings charge against same defendants on charge of felonious entry, 56.

3. An "attested" copy of an affidavit of claim is not a certified copy as required under the Act of July 7, 1879 P. L. 194, 182.

4. What a record in summary conviction before a justice for circulating a petition on Sunday must show, 191.

5. An appeal non pro tunc will not be allowed from a judgment against the garnishee in an attachment execution after the twenty days have expired, 306.

LANDLORD AND TENANT.

1. A lessee of a hallway acquires no right to erect a show case on the front of the building which equity will preserve, 144.

2. A lease contained an option that lessor might purchase "the aforesaid leasehold together with all things thereunto belonging or appertaining." Held that the exercise of the option did not pass title to new chattel which had replaced an old one on the premises, 166.

LIFE ESTATES. SEE WILLS.

LIQUOR LAW.

1. Reasons for granting or refusing licenses, 179.

LIENS.

A judgment creditor was induced to make a loan on the representations of decedent and his son, that son had a judgment

of $500.00 on record, whereas it was $1000.00. Held priority of son's lien, will not be disturbed, 362.

MANDAMUS.

1. A writ of mandamus will not be allowed at the instance of an intervenor after purpose of writ has been fully accomplished, 156.

2. A garnishee not having taken all necessary steps to take an appeal from a justice a mandmus will not lie to effect such appeal, 306.

MASTER AND SERVANT. SEE NEGLIGENCE.

1. A pumping station is an industrial establishment within Act of May 2, 1905, which provides for the safety of employees, 163.

MINES AND MINING.

1. No verticle support can be required when a deed specifically reserves the right in grantor to mine with no liability for injury to the surface, 378.

MUNICIPAL LAW. SEE EASEMENTS.

1. Under Act of June 27, 1913, mayor of cities of third class has no discretion in signing ordinances passed by a majority of councils, 396.

2. Ordinances of cities of third class do not become effective until signed by the mayor and attested by the city clerk, 396.

3. Act of April 15, 1907 P. L. 90, amending Act of May 25, 1887 P. L. 267, authorizes cities and boroughs to condemn property for water rights, 22.

MUNICIPAL LIEN.

1. Though city has lost right to file lien for sewer connection it may still refuse to allow connection by property owner who has not paid cost assessed, 317.

NEGLIGENCE.

1. Defendant's negligence will not be submitted to jury where facts are undisputed and as a matter of law there is no negligence, 17.

2. Townships may be liable for failure to remove snow within a reasonable time, 88.

3. Where there is a choice of highways choosing the more dangerous is not negligence as a matter of law; the question of contributory negligence is for the jury, 88.

4. A foreman who directs a workman to fasten hooks of a crane to a condemned wicket is not a fellow servant under Act of June 10, 1907, 95.

5. It is contributory neligence defeating recovery on the part of an employee when he neglects to use rubber gloves provided for purpose in changing circuits of arc lights, 137.

6. Negligence of a fellow servant bars recovery; a motorman on another car is a fellow servant, 224.

7. Casual connection between an injury and negligence may be shown circumstantially, 242.

8. Its duty of automobile under certain circumstances to stop when approaching a fractious horse, 258.

9. Burden is on employee to show that failure to guard a machine was the cause of the accident, 408.

PAROCHIAL SCHOOLS. SEE TAXATION.

PARTITION.

1. Master cannot allow fee direct to plaintiff's attorney; compensation is for plaintiff, 44.

2. Proceeds of a sale of real estate in partition are inherited as real estate, 76.

PARTNERSHIP.

1. One member of partnership may sue in the name of the partnership to recover assets against the consent of the other partners, 217.

PARTY WALL. SEE EQUITY.

PRACTICE. C. P.

1. An affidavit of defence setting forth facts which if believed would be a defence is sufficient even though certain items of damages are not specifically denied, 183.

2. The submission of a case stated is irregular which authorizes the entry of a judgment against one of the parties who is not a party to any case in court, 231.

3. Remarks of counsel are not a reason for a new trial where they do not appear clearly on record and are withdrawn by counsel making them, 240.

4. Proper practice after evidence has been admitted without objection is to request the court to instruct jury to disregard same, 258.

5. On appeal from judgment before justice defendant entered rulee on plaintiff for statement, then before filing of statement, he entered plea and failed to file an affidavit of defense; held judgment for want of an affidavit of defense will stand, 329.

6. Motion to amend pleadings in ejectmentt without a petition or by particulars fairly persuasive, will not be allowed when objected to, 349.

7. When in ejectment defendant's right to possession is thing at stake it must be first pleaded and established by parol evidence, 49.

PRACTICE. O. C.

1. To admit a second will to probate practice is to appeal from Register of Wills action, 52.

PROXIMATE CAUSE.

1. During an extraordinary storm a tree fell upon electric wires, which came in contact with a sheet iron front of a building charging it so that a person was killed who came in contact with it. Held the facts did not prove that defendant's negligence could be the proximate cause of the injury and hence was not submitted to jury, 17.

PRESCRIPTION. SEE EASEMENT.

REPLEVIN.

1. Seller cannot recover goods by replevin from receiver of purchaser in absence of misrepresentation of solvency of purchaser when sale was made, 101, 105.

RULE IN SCHELLEY'S CASE.

1. Children held a word of purchase and not of limitation, 325.

2. A devise to A and B, her husband, or the survivor for life, and after their decease "to come to the children of A or to their lawful heirs share and share alike" creates a life estate, 403.

SALES. SEE REPLEVIN.

1. Title to goods ordered to be shippel on a specified date, but shipped before that date and received by the buyer, passes to the purchaser and seller cannot rescind sale, 105.

2. An agreement that title to personal property delivered to vendee shall remain in vendor until paid is a conditional sale and not a bailment and is worthless as against creditors and bona fide purchasers from the vendee, 248.

SCHOOL DISTRICT.
1. Any taxpayer may intervene in behalf of a school district and defend against a suit or judgment, 156.
SPECIFIC PERFORMANCE. SEE EQUITY.
STATUTES.
1. On effect of amending one section of an earlier statute, 174.
STREETS. SEE BOROUGHS.
SUBROGATION.
1. A, B and C were makers of a note in favor of X. C assigned for creditors. A and B paid note. Held A was entitled to a distribution of assigned estate by subrogation, 302.
SURETYSHIP.
1. A promise to pay goods furnished to another "as fully as if purchased by myself" is a contract of surety, 197.
TAXES.
1. Taxes due for past years from a corporation but not filed until after judgment by an individual is entered will not be given priority, 28.
2. Corporation loan tax is a personal tax and has no preference in judicial sales, 28.
3. Tax settlements are contemplated to be made annually by Auditor General, 28.
4. A parochial school is exempt from taxation, if that institution does not unlawfully discriminate against any part of the public, 383.
TENANTS IN COMMON.
1. Tenant in common, out of possession, is entitled to his share of rent regardless of judgment against co-tenant in possession, 44.
TOWNSHIPS. SEE NEGLIGENCE.
1. Townships of the first class may impose mileage license tax on water mains, but not a grossly excessive tax, 171.
TROVER AND CONVERSION.
1. Trover and conversion does not lie for growing crops; trespass on the case is the proper action, 55.
VERDICT.
TRUSTS. SEE WILLS.
1. When a verdict is against the weight of the evidence a new trial will be granted, 142.
WILLS. SEE PRACTICE O. C., JURISDICTION AND RULE IN SHELLEY'S CASE.
1. When a vested interest is created, 123.
2. A bequest of interest of a certain sum without trusteeship nor any limitation is a bequest of the fund itself, 199.
3. Grandchildren held to be within the term children, 211.
4. A life estate with power of consumption may be created under a will, 311.
5. A life estate may have super-added power sale, 322.
6. A delusion sufficient to overthrow a will must be an insane delusion not the product of reason but merely a figment of the imagination, 370.
7. An option under a will to purchase land must be exercised within a reasonable time, 49.
8. After a will has been probated a second one may only be admitted to probate after allowance on an appeal from the Register of Wills to the Orphans' Court, 52.
9. In order to raise a trust under a will court must be satisfied that such was testator's intention, 123.

10. Conversion results under a will only when the real and personal estate are blended and the intention is that the fund raised shall be bequeathed as money, 123.

WITNESSES.

1. In suit by widow for the death of her husband under the Acts of 1851 and 1855, the adverse interest of a witness does not disqualify him under the Act of May 23, 1887, 117.

2. As to an unwilling witness being contradicted by person calling him, 177.